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NUCLEAR REGULATION REORGANIZATION AND REFORM ACT OF 1988

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OF THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS UNITED STATES SENATE

TO ACCOMPANY

S. 2443

May 26 (legislative day, May 18), 1988.—Ordered to be printed

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NUCLEAR REGULATION REORGANIZATION AND REFORM ACT OF 1988

MAY 26 (legislative day, MAY 18), 1988.—Ordered to be printed

Mr. BREAUX, from the Committee on Environment and Public Works, submitted the following

REPORT

[To accompany S. 2443]

The Committee on Environment and Public Works reports an original bill (S. 2443), to reorganize the functions of the Nuclear Regulatory Commission to promote more effective regulation of atomic energy for peaceful purposes, and recommends that the bill do pass.

GENERAL STATEMENT

This legislation, the Nuclear Regulation Reorganization and Reform Act of 1988, provides for a comprehensive reorganization of the Federal regulatory program for civilian nuclear power, for the purpose of establishing a credible and effective regulatory framework for commercial nuclear powerplants, as well as for other licensees engaged in the handling or use of radioactive materials regulated under the Atomic Energy Act of 1954, as amended.

The responsibilities and authorities addressed in this legislation, which are currently undertaken by the five-member Nuclear Regulatory Commission (NRC), would be reconstituted in a new agency, the Nuclear Safety Agency (NSA), as an independent establishment within the Executive Branch and to be headed by a single Administrator. The Administrator of the NSA would be appointed by, and serve at the pleasure of, the President, following confirmation by the United States Senate.

In addition, this legislation addresses the manner in which activities in three specific areas shall be undertaken: (i) investigations and audits of agency programs, personnel and contractors; (ii) investigations of wrongdoing by agency licensees; and (iii) investigations of significant safety-related accidents. This legislation also provides for a two-year authorization for the NSA, covering fiscal years 1988 and 1989.

Finally, this legislation includes a number of provisions, unrelated to the reorganization and reform of the NRC, involving various issues that either were the subject of legislative proposals submitted to Congress by the NRC or that arose during the course of the Committee's consideration of the NRC's budget request.

PURPOSE AND BACKGROUND

HISTORY OF NUCLEAR REGULATION

THE ATOMIC ENERGY ACT OF 1946

The statutory origins of the Nuclear Regulatory Commission date back to the Atomic Energy Act of 1946,[1] which was passed by Congress and signed into law shortly following the announcement by President Truman on August 6, 1945 of the first military use of an atomic bomb.

The 1946 Act established a five-member, Presidentially-appointed commission, the Atomic Energy Commission (AEC), charged with two principal functions: producing fissionable materials for nuclear weapons and developing and manufacturing nuclear weapons for military purposes. The commission structure was chosen by Congress to ensure that the weighty and far-reaching policy decisions associated with the production of nuclear materials and the development of nuclear weapons would be undertaken in a careful, collegial, manner with the benefit of a deliberative process involving five individuals from diverse backgrounds. The principal justification for the establishment of a commission was that matters involving the production and possession of nuclear weapons were too significant to entrust to a single individual. As the Joint Committee on Atomic Energy explained in 1949:

> The framers of the [1946 Act] deliberately established a five-man directorate, rather than a single administrator, to control our atomic enterprise for the very purpose of assuring that diverse viewpoints would be brought to bear upon issues so far reaching as those here involved.[2]

Beyond the responsibility that the Congress assigned to the AEC for managing the Nation's nuclear weapons program, Congresss also recognized that there might well be potential civilian applications for atomic energy. Accordingly, while the principle statutory mandate of the AEC focused on the development of weapons, the 1946 Act also declared that "the development and utilization of atomic energy shall, so far as practicable, be directed toward improving the public welfare, increasing the standard of living, strengthening free competition in private enterprise, and promoting world peace." [3] The 1946 Act did not, however, set forth in any significant detail the nature or scope of the AEC's jurisdiction over civilian applications of atomic energy. Indeed, it was not until eight years later that the AEC's responsibilities in this area were clearly defined, when Congress provided the statutory underpinning for the commercial development and exploitation of atomic energy for civilian purposes with the enactment of the Atomic Energy Act of 1954.[4]

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[1] Public Law 585, 79th Cong. (hereinafter referred to as "the 1946 Act").

[2] Madeleine W. Losee, compiler, *Legislative History of the Atomic Energy Act of 1985*, vol. I, P. 859 (1955) (quoting 1949 Joint Committee on Atomic Energy report).

[3] The 1946 Act, section 1(a).

THE ATOMIC ENERGY ACT OF 1954

In 1954, Congress took a significant step in the direction of permitting the private use and development of atomic energy by enacting the Atomic Energy Act of 1954.[5] The 1954 Act permitted and encouraged the private sector to participate in the development and use of atomic energy for peaceful purposes, thereby eliminating the Federal Government's monopoly on nuclear technology.

In addition, the 1954 Act conferred on the AEC the responsibility for licensing and regulating civilian nuclear activities undertaken by the private sector, for the purpose of ensuring that "the processing and utilization of source, byproduct, and special nuclear material [is] regulated in the national interest and in order to provide for the common defense and security and to protect the health and safety of the public".[6] Thus, with the enactment of the 1954 Act, the AEC assumed for the first time the statutory responsibility for regulating civilian applications of atomic energy. Because the debate at that time, however, focused on the decision to establish a program that would promote the civilian uses of nuclear power, Congress devoted little attention during its deliberations on the 1954 Act to the issue of whether a commission structure was appropriate for carrying out regulatory responsibilities.

By 1962, after 16 years of experience with the commission structure, the Kennedy Administration, with the unanimous support of the Commission, had reached the conclusion that the five-member Commission should be replaced by a single administrator. According to one account, setting forth the rationale of then-Commissioner John Graham, the evolving role of the AEC warranted a change from the commission-type organization to a more efficient single administrator structure:

> [Graham] described the production and possession of atomic weapons as the predominant basis for initially vesting trust in a multiheaded commission. Throughout the 1950s, however, the possession of atomic weapons was transferred under presidential directives to the armed forces, leaving the AEC with only the task of producing weapons. This changed situation, Graham noted, had made the Commission "not significantly different from that of any major industrial contractor supplying munitions to the armed forces." Thus the original concept of civilian control of atomic weapons vested in the AEC had diminished with the passage of time. This reduced the necessity

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[4] Public Law 703, 83rd Cong.

[5] *Id.* (hereinafter referred to as "the 1954 Act").

[6] *Id.*, section 2(d).

for a multiheaded body to make awesome decisions on controlling atomic weapons. In its place was needed a more streamlined decision-making process.[7]

Likewise, the Kennedy Administration saw clear advantages of the single administrator format, principally from the standpoint of efficiency and accountability to the Executive Branch. For a variety of reasons, however, including considerable congressional concern that the Kennedy proposal would result in an agency with less accountability to the Congress for its activities, the proposal to replace the Commission with a single administrator was not pursued.

THE ENERGY REORGANIZATION ACT OF 1974

By 1973, the Nation's civilian nuclear power program was well underway, with 43 reactors in operation and nearly 200 more planned or under construction. At the same time, the Administration had turned its attention to the development of a Federal energy policy, focusing on the organization and jurisdiction of the various Federal agencies with energy-related responsibilities.

By this time, concern had arisen in Congress and elsewhere over the ability of the AEC to fulfill what many saw as conflicting statutory mandates: the responsibility for licensing and regulating civilian applications of atomic energy, and the responsibility for carrying out an energy research and development program for the purpose of encouraging the civilian development and use of atomic energy.

Indeed, the growing concern in Congress over the potential conflict in the AEC's dual statutory mandate, together with a much more wide-ranging interest in reorganizing the Federal Government's energy-related programs, led to the enactment of the Energy Reorganization Act of 1974.[8] This Act separated the regulatory functions and the energy research and development functions of the AEC, assigning the AEC's research and development functions, together with the atomic weapons program, to the newly-created Energy Research and Development Administration (later to become the Department of Energy), and the regulatory functions to the newly-created Nuclear Regulatory Commission (NRC).

The question of whether a commission structure is the best means for achieving an efficient and effective regulatory program—which was to be the sole statutory mandate of the newly-established NRC—was not pursued by the Congress. The Senate report on the subject simply noted that the NRC "will take the AEC's present form of four members and a chairman".[9] The House Report[10] and the Conference Report[11] were even more brief in their discussion of the rationale for establishing a commission-type structure to carry out the AEC's regulatory functions.

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[7] George T. Mazuzan and J. Samuel Walker, *Controlling the Atom: The Beginning of Nuclear Regulation*, 1946-1962, p. 401

[8] 42 U.S.C. 5801 *et seq.* (P.L. 93-438).

[9] S. Rpt. 93-980.

[10] H. Rpt. 93-307.

[11] S. Rpt. 93-1252.

THE THREE MILE ISLAND ACCIDENT

It was not until after the Three Mile Island accident in March of 1979 that the first serious congressional consideration, leading to hearings, was given as to whether the commission structure was the best and most effective way for the NRC to carry out the regulatory mandate that had been assigned to it by Congress.

Shortly following the accident, two major investigations were initiated to determine the facts surrounding the accident and to provide recommendations on the steps that should be taken to avoid a similar accident in the future.

In October of 1979, the President's Commission on the Accident at Three Mile Island, which had been established by President Jimmy Carter and was chaired by John G. Kemeny, released its report. After an exhaustive investigation, the Kemeny Commission announced, as its first recommendation, the following conclusion with regard to the commission structure:

> The [Kemeny] Commission believes that as presently constituted, the NRC does not possess the organizational and management capabilities necessary for the effective pursuit of safety goals. The Commission recommends:
>
> 1. The Nuclear Regulatory Commission should be restructured as a new independent agency in the executive branch.
>
> a. The present five-member commission should be abolished.
>
> b. The new agency should be headed by a single administrator appointed by the President, subject to the advice and consent of the Senate, to serve a substantial term (not coterminous with that of the President) in order to provide an expectation of continuity, but at the pleasure of the President to allow removal when the President deems it necessary. The administrator should be a person from outside the present agency. . . .[12]

In conjunction with the recommendation to establish a single administrator, the Kemeny Commission also recommended that:

> An oversight committee on nuclear reactor safety should be established. Its purpose would be to examine, on a continuing basis, the performance of the agency and of the nuclear industry in addressing and resolving important public safety issues associated with the construction and operation of nuclear powerplants, and in exploring the overall risks of nuclear power.[13]

The Kemeny Report was followed by the release of the Report of the Special Inquiry Group, established by the NRC and chaired by Mitchell Rogovin. Again, the commission structure was sharply criticized:

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[12] Report of the President's Commission on the Accident at Three Mile Island (hereinafter referred to as "the Kemeny Commission"), p. 61.

[13] *Id.*.p. 62.

> We have found that the Nuclear Regulatory Commission itself is not focused, organized, or managed to meet today's needs. In our opinion the Commission is incapable, in its present configuration, of managing a comprehensive national safety program for existing nuclear powerplants and those scheduled to come online in the next few years adequate to ensure the public health and safety.[14]

The Rogovin Report went on to make the following recommendation:

> The central and overwhelming need is for legislation and executive reorganization to establish a single chief executive with the clear authority to supervise and direct the entire NRC staff. An effective reactor safety program absolutely requires strong and effective management of this kind.
>
> The NRC is virtually the only agency in the Federal Government charged with protecting public health and safety that is headed by a commission. Regulatory commissions such as the Federal Communications Commission, the Interstate Commerce Commission, the Securities and Exchange Commission, and the Civil Aeronautics Board basically regulate *economic* behavior, not safety. For the most part, the protection of the public safety and health has been committed to single-administrator agencies: the Food and Drug Administration, the Environmental Protection Agency, the Occupational Safety and Health Administration, and the Mine Safety and Health Administration. In the airline safety area, where the CAB regulates economics, the Federal Aviation Administration regulates safety. Indeed, considering the old AEC's lack of interest in regulation, the management of reactor safety was for all practical purposes a single-administrator agency within the AEC until 1975. . . .
>
> There is not an agency in Government that would not better provide for a "diversity of views" if it were headed by a commission. It is not likely, however, that any of these agencies would be as well managed. As the NRC's own history of nonmanagement and lack of leadership amply demonstrates, reflection of diverse views *must* be weighed against effective management, which in this case means effective management of a coordinated safety program. . .
>
> The desire for "diversity" in part mistakes what we believe to be the proper roles for the regulatory agency, the Executive and Congress in our nuclear safety program. We do not believe the proper function of the Commission or administrator should be to consider and resolve competing public attitudes about nuclear power in every individual safety decision that is made. It is precisely this hidden pressure that has played an important role in paralyzing

---

[14] Three Mile Island: A report to the Commissioners and to the Public (hereinafter referred to as "the Rogovin Report"), p. 89.

> the Commission in the past few years. Decisions about the ultimate safety objective in the regulatory program, and about the expansion or reduction of our country's reliance on nuclear power—decisions which inevitably involve a balancing of the risks against the benefits of this technology—should ultimately be made by the Executive and Congress, as part of the Nation's overall strategic energy policy . . .
>
> In the final analysis, we have found that the greatest single improvements in safety can be made by better management of the NRC's regulatory program and by increased requirements for onsite supervisory technical expertise at nuclear powerplants. Both will require an overhaul of the NRC's structure and management. Mounting an affirmative, comprehensive safety program is not a task that requires diversity of opinion. It *is* a task that absolutely requires strong central management controls and unified policymaking.[15]

In addition to recommending the establishment of a single administrator, the Rogovin Report went on to find that there was:

> [A] clear and pressing need for an organizational entity within the agency to be responsible for observing, evaluating, and making recommendations to improve the quality of the overall performance of the regulatory staff. This need can best be satisfied by the establishment of an independent Nuclear Safety Board. This Board would be outside of and independent of all other offices in the agency. The Board should be composed of a number of persons who are trained in technical disciplines associated with nuclear safety and radiation protection and who are thoroughly experienced with the licensing and regulatory process. The Board would be provided with a technical staff appropriate to its functions, and with necessary support personnel. It would not duplicate the functions of any office or provide another layer in the review process, but would instead:
>
> —Exercise oversight on the effectiveness of the licensing review process and the regulation of existing plants.
>
> —Advise the administrator on regulatory goals and important issues for rulemaking.
>
> —Act as an ombudsman group to receive complaints and technical dissents.
>
> —Enhance reactor safety by monitoring the effectiveness of the Office for Analysis and Evaluation of Operational Data's review of operating experience and of all other operational feedback.
>
> —Monitor the staff's use of the latest analytical and design tools, and ensure that modern safety technology is applied throughout the agency's activities.
>
> —Develop and maintain a capacity to investigate accidents and important safety-related incidents, inde-

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[15] *Id.*, pp. 115-117 (emphasis in original).

> pendent of all other offices of the NRC and the Commission or administrator.
>
> The independent Board we envision has an analog in the National Transportation Safety Board (NTSB), which investigates aviation accidents independent of the FAA. But we envision a much larger role for the Nuclear Safety Board in providing a quality assurance function for the agency's regulatory process as a whole.[16]

REORGANIZATION PLAN NO. 1 OF 1980

Upon receiving the recommendations of both the Kemeny Commission and the Rogovin Report, the Carter Administration turned its attention to the subject of reorganizing the commission structure to provide for more effective regulation of the commercial nuclear power industry. On December 7, 1979, President Carter announced that he would send to Congress a Reorganization Plan "to strengthen the Nuclear Regulatory Commission's ability to regulate nuclear safety."

March 18, 1980, in response to the recommendation of the Kemeny Commission for the formation of an oversight committee on nuclear reactor safety, Carter established the Nuclear Safety Oversight Committee and charged it with the responsibility of advising the President on the progress being made in improving nuclear safety, including the progress being made in implementing the recommendations of the Kemeny Commission.

Following that, on March 27, 1980, Carter submitted Reorganization Plan No. 1 of 1980 to Congress to address the organization and operation of the Commission. Rather than convert the Commission to a single administrator, however, as both the Kemeny Commission and Rogovin Report had recommended, President Carter, apparently as a result of the strong concern among some in Congress that the single administrator proposal would weaken congressional control over the regulation of the civilian uses of atomic energy, decided to instead propose a strengthening of the authority of the Chairman of the Commission by clarifying his duties in two particular areas: the day-to-day operation of the agency and during an emergency. The President's message accompanying the proposed reorganization plan explained the respective responsibilities of the Commission as a whole and the Chairman:

> *Commission*
>
> Under the proposed Plan, the Commission would continue to be responsible for policy formulation, rulemaking and adjudication as functions which should have collegial deliberation. In addition, the Commission would review and approve proposals by the Chairman concerning key management actions such as personnel decisions affecting top positions which directly support Commission functions, the annual budget, and major staff reorganizations. In carrying out its role, the Commission would have the direct assistance of several Commission-level offices as well as

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[16] *Id.*, pp. 118-119.

the licensing boards, the appeal panel, and the Advisory Committee on Reactor Safeguards. The Plan would not alter the present arrangement whereby the Commission, acting on majority vote, represents the ultimate authority of the Nuclear Regulatory Commission and sets the framework within which the Chairman is to operate.

Chairman

Under the Plan, the Chairman would act as the principal executive officer and spokesman for the Commission. To accomplish this, those functions of the Nuclear Regulatory Commission not retained by the Commission would be vested in the Chairman, who is currently coequal with the Commissioners in all decisions and actions. The Chairman would be authorized to make appointments, on his own authority, to all positions not specified for Commission approval and would be responsible to the Commission for assuring staff support by the operating offices in meeting the needs of the Commission. The Executive Director for Operations would report directly to and receive his authority from the Chairman. Heads of operating offices would also report to the Chairman or, by delegation, to the Executive Director for Operations. Office heads would also be authorized to communicate directly with members of the Commission whenever an office head believed critical safety issues were not being addressed.

Emergency management

The Nuclear Regulatory Commission's ability to respond decisively and responsibly to any nuclear emergency must be fully ensured in advance. Experience has shown that the Commission as a whole cannot deal expeditiously with emergencies or communicate in a clear, unified voice to civil authorities or to the public. But present law prevents the Commission from delegating its emergency authority to one of its members. The Plan would correct this situation by specifically authorizing the Chairman to act for the Commission in an emergency. In order to ensure flexibility, the Chairman would be permitted to delegate his authority to deal with a particular emergency to any other Commissioner. Plans for dealing with various contingencies would be approved by the Commission in advance. The Commission would also receive from the Chairman or his designee describing the management of the emergency once it was over.[17]

Hearings were held on the President's Reorganization Plan before the Committee on Governmental Affairs of the United States Senate on April 17, 18, and 29, 1980. In testifying on the proposed plan, Mitchell Rogovin noted that it:

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[17] Message from the President of the United States transmitting plan No. 1 of 1980 (March 27, 1980).

> [I]s an extraordinarily weak substitute for the single administrator that the two commissions have called for. . . . The theoretical advantages of collegiality which prompted the Congress to establish a five-member Commission 6 years ago have failed to manifest themselves in an effective nuclear safety program. They are particularly ill-matched to the urgent problems the agency faces now." [18]

Dexter Peach of the General Accounting Office, on the other hand, testified in support of the plan:

> [T]he reorganization plan now before you for consideration is an important step in the right direction. Specifically, the plan focuses the Commission's work on what we believe are the most basic and important responsibilities of nuclear regulation: Policy formulation, rulemaking, and adjudications; makes NRC's Chairman the agency's principal executive officer in fact as well as in name; and permits the Chairman to clearly define the role of the Executive Director for Operations in day-to-day regulatory activities.[19]

Four of the five NRC Commissioners supported the President's plan as well, with only the then-Chairman, John Ahearne, supporting the single administrator proposal.

On May 5, 1980, Carter transmitted an amended version of the Reorganization Plan to Congress, with three specific changes: (1) the Commission would be given a greater role in the selection of key agency officials, by adding four positions to the list of appointments that require the approval of the Commission—the Executive Director for Operations, the Director of Inspection and Enforcement, the Director of Nuclear Regulatory Research, and the Director of Standards Development; (2) the Chairman would be charged with the responsibility for planning the development of policy for consideration and approval by the Commission; and (3) the Executive Director for Operations would be delegated the authority for the appointment of the EDO's staff and for the day-to-day administration of the agency, and would be obligated to keep the Commission fully and currently informed, through the Chairman, of the EDO's activities.

Following submission of the amended plan, the Subcommittee on Government Operations of the Committee on Government Operations of the House of Representatives held a hearing on May 6, 1980.

In accordance with the procedures for consideration of proposed reorganization plans, resolutions of disapproval were introduced in each house of Congress (S. Res. 397 and H. Res. 624) and subsequently reported, respectively to the full Senate and House, with recommendations that the resolutions do not pass and that Reorganization Plan No. 1 of 1980 thereby be allowed to go into effect.

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[18] Hearings before the Committee on Governmental Affairs, U.S. Senate, reorganization plan No. 1 of 1980, pp. 188–189.

[19] *Id.*, pp. 185–186.

On May 30, 1980, the full House considered and rejected H. Res. 624. No action was taken by the full Senate. Accordingly, on October 1, 1980, Reorganization Plan No. 1 of 1980 went into effect.

THE NUCLEAR SAFETY BOARD PROPOSAL

Following the adoption of Reorganization Plan No. 1 of 1980, attention turned to consideration of the proposal to establish a Nuclear Safety Board. This concept, which had originally been advanced by a member of the Commission's Advisory Committee on Reactor Safeguards, H.W. Lewis, in 1978 and later endorsed in a modified form by the Rogovin Report, called for creation of an independent organization to comment on the state of nuclear safety, to investigate accidents, and to evaluate precursor events.

In September of 1981, the President's Nuclear Safety Oversight Committee, (NSOC), examined this and other similar proposals for the creation of an outside board, and reached the following conclusion:

> Difficult as it is to oppose further scrutiny and another hard look at issues of such significance, we find unpersuasive most recent proposals to create additional regulatory boards, commissions, or committees. Creation of a Nuclear Safety Board, or a permanent Nuclear Safety Oversight Committee, or a Blue Ribbon Oversight Committee seems as likely to compound the problem as to contribute to its solution. . . . The principal argument against a new independent regulatory board is [Governor Bruce] Babbitt's [Chairman of the President's Nuclear Safety Oversight Committee]: none of the identified failings in current regulatory activity is likely to be remedied by duplicating the regulatory function. The current fractionation of authority over nuclear regulation contributes significantly to most of the failings identified. To add to the five horses now tugging in competing directions a sixth or seventh seems unproductive.[20]

Following the release of the NSOC's report, the safety board proposal received no further attention until, on February 22, 1983, the control rods at the Salem nuclear powerplant in New Jersey failed to insert as a result of a failure in the reactor trip system. The same event occurred again three days later. Both the licensee and NRC investigations failed to identify the February 22 event as an "anticipated transient without scram." In addition, the subsequent testing conducted by the NRC, the vendor, and the licensee were poorly coordinated and, in some respects, overlapping.

As a result of the Salem event, Congress directed the Nuclear Regulatory Commission in 1984 to conduct a study of the need for an independent organization to conduct investigations of significant safety events, including significant operational events, at facilities licensed by the Commission.[21] In response to this directive, the Commission submitted a report to Congress on February 27, 1985, prepared by the Brookhaven National Laboratory, on the need for and feasibility of an independent organization to investigate significant safety events.[22] The Brookhaven report identified six areas where improvements were needed in the investigation of events by the Nuclear Regulatory Commission and, on behalf of the industry, by the Institute of Nuclear Power Operations:

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[20] Governance of Nuclear Power, Graham Allison, Albert Carnesale, Paul Tigman, Francis X. De Rosa, submitted at the request of the President's Nuclear Safety Oversight Committee (Sept. 1981).

[21] H. Rpt. 98-866, pp. 81-82.

> (a) A more structured and coordinated approach to the investigation of significant events to minimize the number of overlapping investigations and to focus on fact finding and determination of cause as the primary goal.
>
> (b) Procedures to "freeze" plant conditions and personnel as soon as possible after a significant event to preserve the evidence for fact finding.
>
> (c) Separation of fact finding from determination of regulatory compliance to minimize the adversarial relationship between NRC and utility personnel and to minimize a potential conflict of interest on the part of the NRC staff due to its prior licensing, regulatory or enforcement actions or omissions.
>
> (d) Requiring investigators to have greater operating experience and training in conducting investigations.
>
> (e) More accurate and timely descriptions of operational events and identification of significant events.
>
> (f) Improved feedback in a more timely manner of the results of the investigations, including determination of cause, to the utilities and the public and more timely consideration of the recommendations.[23]

The report then went on to recommend that a statutory Office of Nuclear Safety (ONS) be established, with the responsibility for fact-finding and determination of cause of operational events. This Office would be headed by a director reporting to the Commissioners and would be entirely separate from the regulatory and compliance arms of the NRC. The Report continued:

> Since it is estimated that in the next three or four years there will be no more than about 12 significant events per year requiring full field investigations, it is recommended that the ONS have a total staff of about 80. This represents an additional 30 technical staff for investigative work (15 at Headquarters and 15 distributed in the five regional offices) over the currently anticipated staff of about 50 for [the Commission's Office for the Analysis and Evaluation of Operational Data]. If the number of events to be investigated were to increase significantly, requiring a substantial increase in technical investigators, or if a greater oversight role over the NRC than is envisioned here is deemed desirable, then the establishment of an NSB independent of NRC should be considered. This progressive development towards greater independence would be similar

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[22] An independent safety organization, prepared for the U.S. Nuclear Regulatory Commission by the Department of Nuclear Energy, Brookhaven National Laboratory (Feb. 15, 1985).

[23] *Id.*, p. XVIII.

> to the history of the independent NTSB which, at its inception, was a part of the Department of Transportation. However, a strengthened ACRS with a broader scope could also provide the oversight function.[24]

On June 10, 1985, in response to the shortcomings identified by the Brookhaven Report in the Commission's program for the investigation of significant operational events, the NRC staff recommended that an expanded and strengthened program for the investigation of significant events be developed and implemented. The program recommended by the staff involved two new initiatives:

> For the few significant events with clear and serious implications for public health and safety, an inter-office, interdisciplinary team will be formed to conduct a prompt, thorough and systematic investigation of the event. For a larger number of events with lesser significance or whose implications are not as clear, the regional-based investigation will be augmented by the assignment of one or more headquarters technical expert(s) who will participate in the event investigation and analysis, and preparation of the final report.[25]

The program proposed by the staff would be implemented by the Commission's Office for the Analysis and Evaluation of Operational Data (AEOD), a staff-level organization reporting directly to the Executive Director for Operations. On October 16, 1985, the Commission, by a vote of 3-to-2, approved the staff's proposal. The two dissenting Commissioners, Asselstine and Bernthal, would have preferred that the Commission consider the establishment of a Commission-level Office of Nuclear Safety.

INVESTIGATIONS INTO LICENSEE WRONGDOING

At the same time that the Commission was endeavoring to address the shortcomings identified in its incident investigation program, the Commission also turned its attention to the investigation of wrongdoing by Commission licensees. While this issue was not addressed in either the Kemeny or Rogovin reports, serious deficiencies in the Commission's investigative capabilities were identified shortly following the Three Mile Island accident.

Up until 1982, the responsibility for conducting investigations into licensee wrongdoing was shared primarily between the Commission's Office of Inspection and Enforcement (IE) and the Commission's Office of Inspector and Auditor (OIA). No single office was assigned the exclusive responsibility for investigating potential wrongdoing by licensees. In addition, the Commission lacked the staff with the necessary investigative qualifications to identify and pursue criminal wrongdoing. Consequently, the overlapping jurisdiction led to confusion both within and outside the agency over who had the responsibility for conducting investigations. In addition, the lack of adequately qualified investigative staff led to instances where problems arose in the investigation of potential criminal wrongdoing.[26]

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[24] *Id.*, p. XX.

[25] Secy. 85.208, Incident Investigation Program, June 10, 1985.

Accordingly, on April 20, 1982, the Commission announced that it was establishing an Office of Investigations to be responsible for investigating wrongdoing by licensees, applicants, contractors, and vendors. The newly-established Office would report directly to the Commission, thereby giving it the high-level attention that, in the Commission's judgment, the investigative function warranted, with all of the agency's investigative responsibilities and resources centralized in this one Office.

SUMMARY

The chronicle of regulatory developments described above, beginning in 1946 with the establishment of the Commission and continuing through the series of changes adopted in response to the Three Mile Island accident, represents over four decades of evolution in the Federal regulatory structure for the commercial nuclear power industry. Significant changes—some legislative, some administrative—have occurred in the Federal regulatory structure during this period. Over the same time, there have been significant changes in the commercial nuclear power industry, itself, from the time that the Federal Government first began regulating this industry in 1954.

The Committee has examined in careful detail the question of whether, as a result of these various incremental changes, we have in place today a regulatory structure that is designed for, and capable of, regulating the commercial nuclear power industry today and in the future in an effective, efficient, accountable, and credible manner.

The Federal program for the regulation of commercial nuclear power has come under increasing criticism for a variety of reasons. As a consequence, the credibility of the regulatory program has suffered, leading to a steady erosion in the confidence of the Congress and the public in the Commission and, unfortunately, in nuclear power.

The Subcommittee on Nuclear Regulation began a comprehensive review of the organization and operation of the Nuclear Regulatory Commission in 1986. The initiative continued in the 100th Congress, with a series of hearings focusing on the wide-ranging concerns that have been expressed about the organization and operation of the Commission. All told, the Subcommittee has conducted 12 hearings over this period of time on various aspects of the Commission's organization and operation.

In addition, the Subcommittee has examined a wide range of specific cases or initiatives that have come before the Commission, where the performance of the Commission as a whole, or in some limited respect, has been sharply criticized. More generally, the Subcommittee has examined the manner in which the Commission carries out its business, including the procedures for conducting meetings and arriving at decisions, the role of the Office of Management and Budget in the agency's decisionmaking process, and the role of various industry organizations in the regulatory process. The results of this inquiry are set forth in the Appendices to this report.

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[26] See Appendix 2 for a more detailed discussion of the history of the Office of Investigations.

To a certain extent, the controversy over the activities of the Nuclear Regulatory Commission is an inherent result of the oftentimes controversial issues with which this Agency must deal, as well as the polarized views of the public on the issue of nuclear power. The Committee has reached the conclusion, however, that the Commission structure is incapable of providing an effective and credible regulatory program for the civilian uses of nuclear power. And now, based upon the past eight years of experience, it appears that the effort to address these concerns by strengthening the authority of the Chairman of the Commission has proven to be ineffective.

Accordingly, the Committee has concluded that fundamental changes in the organization of the Commission are required. Those changes are discussed in the following section.

MAJOR PROVISIONS OF THE COMMITTEE BILL

Title I—Reorganization and Reform of Nuclear Energy Regulation

SUBTITLE A—NUCLEAR SAFETY AGENCY

Perhaps the most pressing concern in the area of nuclear regulation today that is addressed by this legislation is the organization of the very agency charged with carrying out the Federal regulatory program, the Nuclear Regulatory Commission. In short, the Committee has found that the Commission structure is poorly suited to the task of regulating the commercial nuclear power industry.

As a means of formulating decisions, the Commission decisionmaking process is inefficient and, frequently, indecisive. The accountability necessary to ensure that decisions are made in a timely manner is diffused among five Commissioners, with each sharing equal responsibility for the formulation of Commission policy. The additional authority that Reorganization Plan No. 1 sought to confer on the Chairman, by making him the principal executive officer of the Agency, has been substantially diluted by the prerogative of the Commission as a whole to determine what issues fall within the policy arena.

No single individual is responsible for a decision, once made. This has led to an often frustrating sense within the Commission's staff and within Congress, as well as among the public at large, that the Commission does not speak with a single voice and, unfortunately, the consequent perception that the Commission is an indecisive, ineffective regulator of the nuclear power industry. In some instances, the process results in intolerable delays in the rendering of decisions. The Commission staff, for example, identified the issue of alcohol and drug use by employees at nuclear powerplants as a potentially significant problem as early as 1982. Yet it took the Commission over four years to establish a Commission policy on this matter—as it debated the merits of promulgating a rule versus publishing a policy statement. And today, more than six years after the problems were first identified, the Commission is still in the midst of formulating its position on this issue, with a final rule still over a year away.[27]

In other instances the present process results in decisions being deferred for resolution by the Commission's adjudicatory boards in the context of individual proceedings. And because of the adjudicatory nature of the process and the role of the Commission as the final arbiter within the Agency, the Commission is further isolated from the formulation of policy.

Beyond that, the collegial decisionmaking process has evolved over the years to the point where it appears that very little collegial decisionmaking actually takes place at the Commission, with all five Commissioners present to discuss and decide on the course of action that the Commission intends to take on a particular issue. More often than not, the decisions rendered by the Commission are the product of an exchange of written views by individual Commissioners, either through the Commission's notation voting process or through the COMSECY process. Where meetings do occur that involve all five Commission offices, staff assistants for individual Commissioners often serve as proxies, exercising power in a manner that is not fully subject to public scrutiny and accountability.[28]

The commercial nuclear power industry, on the other hand, demands a decisive and timely regulator. Critical health and safety issues must be addressed in a prompt and efficient manner.

In order to achieve more prompt and efficient regulation, and in view of the shortcomings within the existing commission structure, this legislation would establish a new agency, the Nuclear Safety Agency, in place of the current Nuclear Regulatory Commission, for the purpose of carrying out the functions currently assigned to the NRC. This new agency, which would be an independent establishment within the Executive Branch, would be headed by an Administrator nominated by the President and confirmed by the Senate. Once confirmed, the Administrator would serve at the pleasure of the President. In addition, the bill provides for the appointment of a Deputy Administrator. All functions of the NRC would be transferred to this new agency. The detailed steps necessary to achieve this transfer are set forth in sections 106 through 113 of title I, and are explained in detail in the section-by-section analysis.

One specific aspect of title I warrants further discussion here. During the Committee's debate on this bill, various concerns were expressed about the independence of the NSA's decisionmaking process and, in particular, about the potential for the policies and decisions of the NSA to be unduly affected or influenced by other offices or departments of the Executive Branch. On this same point, the Commission expressed the view that the new agency "should have the independence to make the necessary public health and safety judgments." [29]

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[27] For a more detailed discussion of the Fitness for Duty initiative, see Appendix 3.

[28] For a more detailed discussion of the Commission's decisionmaking and meeting procedures, see Appendix 8.

[29] Letter from Lando W. Zech, Jr., Chairman, Nuclear Regulatory Commission, to Hon. John B. Breaux (Nov. 9, 1987).

The Committee examined in detail the relationship of the Commission to other Executive Branch offices and departments, focusing specifically on the relationship between the Office of Management and Budget and the NRC.[30] In addition, the Committee examined the special role that the Commission has under the Nuclear Waste Policy Act of 1982 for overseeing and regulating certain activities of the Department of Energy under that Act.

Based upon this examination, the Committee has included a number of provisions in this bill that address the independence of the NSA's decisionmaking process. First, section 103(d) provides that for purposes of the Paperwork Reduction Act and any Executive Orders promulgated pursuant to or for the purpose of implementing that Act (and including Executive Orders 12498 and 12291), the NSA shall be treated in the same manner as independent regulatory agencies under that Act. While this provision does not exempt the NSA from the Paperwork Reduction Act, it does provide that the Act shall be applied in the same manner as it is applied to independent regulatory agencies.[31] Section 103(d) also provides that the NSA shall keep the authorizing committees of the Congress fully and currently informed with respect to the activities of the Agency. Under section 103(d)(2), this is to include submission to the authorizing committees of copies of budget estimates, requests, and information (including personnel needs), legislative recommendations, prepared testimony for congressional hearings, and comments on legislation submitted to the Office of Management and Budget, at the same time that those documents are submitted to OMB.

Second, section 113 of title I addresses the procedures for the NSA's consideration of an application submitted by the Department of Energy for a construction authorization for a repository under the Nuclear Waste Policy Act of 1982. Two specific steps in the existing process, the procedures for establishing the licensing board and the standard for administrative appeal of the board's final decision, are addressed by this provision. With regard to the procedures for establishing the licensing board, section 113 provides that within 60 days after the date on which a site designation for a geologic repository becomes effective under the Nuclear Waste Policy Act, the Nuclear Waste Technical Review Board shall nominate not less than six persons for appointment to the licensing board to be established by the NSA for the purpose of considering DOE's application for a construction authorization. Section 113 further provides that in subsequently establishing the three member board that is to consider DOE's application, the Administrator shall select two of the three board members from the six candidates nominated by the Nuclear Waste Technical Review Board. The third member appointed by the Administrator shall be an individual qualified in the conduct of administrative proceedings.

With regard to the standard for administrative appeal of the board's final decision, section 113 provides that once the board has rendered its final decision on DOE's application, the Administrator may either affirm the decision or remand the decision to the licensing board for further action if it is unsupported by substantial evidence on the record.

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[30] For a more detailed discussion of the relationship between the Nuclear Regulatory Commission and the Office of Management and Budget, see Appendix 9.

[31] Appendix 9 includes a detailed summary of the manner in which the Paperwork Reduction Act and Executive Orders 12498 and 12291 currently apply to the Nuclear Regulatory Commission.

SUBTITLE B—OFFICE OF INSPECTOR GENERAL

Subtitle B of this bill establishes an Office of Inspector General for the agency, by adding the NSA to the list of agencies covered by the Inspector General Act of 1978. The Inspector General would be appointed by the President with the advice and consent of the Senate. He or she would be removable only by the President in accordance with the procedures set forth in the Inspector General Act of 1978.[32]

The Inspector General established under this subtitle would perform the duties and functions designated in the Inspector General Act of 1978. These include auditing agency programs and investigating internal agency conduct for waste, fraud, and abuse. The authorities currently assigned to the Office of Inspector and Auditor (OIA) of the Nuclear Regulatory Commission, as well as the personnel and resources of that office, would be transferred to this new office.

The NRC's Office of Inspector and Auditor was established by the Commission on January 20, 1975. To carry out its responsibilities, OIA conducts both audits and investigations. Audits of NRC programs and administrative functions are designed to determine whether desired program results and objectives are achieved efficiently, whether resources are managed and used economically and effectively, whether applicable laws and regulations are observed, and whether financial reports are presented fairly. Investigations are designed to establish and verify facts concerning the conduct or misconduct of NRC employees and contractors. OIA may conduct criminal investigations to determine whether there have been violations of the Federal Criminal Code, the criminal provisions of the Atomic Energy Act, and other Federal proscriptive statutes pertaining to Federal employees. The Director of OIA reports directly to the Commission. Thus, the Commission has complete supervisory authority over the operations of OIA. Generally, the Commission may initiate, terminate, or supervise specific investigations, and establish general guidelines, standards, or procedures for the operation of the office.

A mechanism to audit and investigate the operations of a government agency is necessary to ensure that the agency carries out its responsibilities in accordance with applicable statutes and regulations. The Congress and the public must have confidence that the agency is executing its functions in an efficient and proper manner.

The principal reason for the creation of an independent Inspector General is that the current structure, with the Director of OIA reporting directly to and removable by the Commission, creates the potential for a conflict of interest whenever it is necessary to audit or investigate the programs or activities of the Commission, including the activities of the Commissioners themselves. Under these circumstances, those whose programs and activities would be under investigation or audit also would be in charge of the investigators or auditors. The potential for, and appearance of, a conflict of interest under this arrangement has the potential for undermining confidence in the investigations and audits of the activities of the Commission.

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[32] 5 U.S.C. App. 3, sec. 1 *et seq.*

For this very reason the inspectors general established under the Inspector General Act of 1978 are removable only by the President, and not by the head of the agency over which the inspector general has oversight responsibilities. The rationale behind statutorily insulating these inspectors general from the possibility of removal by those under investigation applies no less to an inspector general for the NRC.

There are a number of specific cases, discussed in more detail in Appendix 1, that suggest that an independent Inspector General, as provided for in this bill, is necessary to ensure that the agency will be provided in a timely manner the thorough and objective results of audits and investigations that are essential to ensure that the agency's programs and activities are carried out in a proper and efficient manner. For example, the events surrounding the discovery of an internal NRC document originating in the office of Commissioner Thomas M. Roberts concerning a potential investigation of a licensee, in that licensee's files, illustrates the inherent conflict with the present system. When presented with the facts surrounding the discovery of this document in the licensee's files, Commissioner Roberts concluded, with the concurrence of Chairman Palladino and the other Commissioners, that since, under Reorganization Plan No. 1 of 1980, supervision of personnel within the immediate office of each member of the Commission is that Commissioner's responsibility, this was a matter for Commissioner Roberts himself to investigate rather than OIA. In this instance, OIA was not given the opportunity to investigate this matter. Had there been an independent Inspector General for the NRC at the time this issue arose, the matter might have been investigated in a more thorough and objective manner.[33]

This conflict of interest problem may also be responsible, in part, for the lack of confidence expressed by some NRC employees in the ability of OIA to adequately and independently investigate allegations of improper conduct by other NRC employees. It appears that some NRC employees feel that OIA is unable to investigate allegations of misconduct involving agency management in an independent manner.

The establishment of an independent Inspector General should address the concerns with the current structure. The IG will be free to investigate all matters within its jurisdiction in an independent manner. The establishment of this office will conform the agency's internal investigation and audit functions to all executive departments and agencies covered under the Inspector General Act of 1978. This should, in turn, lead to greater confidence that the regulation of nuclear power is being carried out in a fair, efficient, and proper manner.

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[33] For a more detailed discussion of the release of the document from the Office of Commissioner Roberts, see Appendix 1.

SUBTITLE C—OFFICE OF INVESTIGATIONS

Subtitle C of this bill codifies the Office of Investigations (OI) within the Commission. The responsibilities of this office, which will be headed by an Assistant Administrator, are to include the investigation of intentional wrongdoing by NSA licensees in violation of the statutes that the NSA is charged with implementing. Except as specifically provided, the bill codifies the existing policies and practice of the Commission's Office of Investigations.

The Commission established OI in April, 1982, in order to provide the Commission with the professional expertise necessary to undertake investigations of wrongdoing by NRC licensees. Prior to the creation of OI such investigations were the responsibility of the Office of Inspection and Enforcement (I&E), whose primary responsibility was to inspect NRC licensed facilities for compliance with technical and regulatory requirements. The Office of Inspector and Auditor was also involved in conducting investigations. I&E inspectors were trained in the technical aspects of nuclear regulation and typically had little experience with investigations into intentional violations of statutes or regulations. The Commission created OI in response to increasing criticism and concern over the capability of I&E technical personnel to perform thorough and credible investigations of wrongdoing.

For most of its existence, OI has reported directly to the Commission. It is responsible for conducting and supervising investigations into the conduct of licensees, applicants for licenses, contractors, or vendors. It may initiate an investigation at the request of the NRC staff, or on its own initiative. Where reasonable cause exists to believe that a violation of Federal criminal law has occurred, OI will report the matter to the Department of Justice.

The functions performed by OI are an integral part of the Commission's program for regulating its licensees. The Commission must have the capabilities that are provided by OI to carry out its statutory mandate to protect the public health and safety. The effective regulation of these licensees depends to a large degree upon the accuracy and credibility of information provided to the Commission by the licensees. Accordingly, acts or allegations of intentional wrongdoing by agency licensees undermine the foundations of the regulatory structure and can have serious adverse consequences for public health and safety. Thus, it is essential for the agency to have the capability to investigate allegations of, and detect, intentional wrongdoing.

Another important function of OI is to assist the Department of Justice (DOJ) in investigating and prosecuting violations of the Atomic Energy Act. DOJ has the primary responsibility within the federal government for the prosecution of criminal violations of federal law. Because of the highly technical nature of the regulatory structure established by the Atomic Energy Act and of the activities conducted by NRC licensees, special expertise often is necessary to successfully detect, investigate, and prosecute criminal or willful violations of the Act. DOJ therefore often must rely upon the expertise of the NRC, and OI in particular, for assistance in criminal investigations and prosecutions related to violations of the Atomic Energy Act.

As more fully discussed in Appendix 2, ever since its establishment, there have been differences of opinion within the NRC regarding the scope of OI's authority and responsibility. For example, there has been considerable debate within the Commission as to whether OI should have independent authority to initiate investigations or whether OI's priorities should be established by the regulatory staff. A related debate has centered on whether OI should report to the regulatory staff or directly to the Commission.

Much of the controversy surrounding the supervision of OI stems from an inherent tension between the functions of OI and the functions of the technical regulatory staff. Whereas the technical regulatory staff is concerned primarily with inspecting for technical conformance with regulatory requirements, the OI staff is concerned primarily with investigating whether any willful violations of these regulatory requirements may have occurred.

In the past, there has been considerable conflict in the pursuit of these two objectives by the offices within the Commission charged with these respective responsibilities. These conflicts have consumed considerable resources. Extensive and numerous memoranda have been exchanged within the agency and the debates have been the focus of congressional testimony. The time and effort spent on these issues has diverted manpower and attention that otherwise should be spent on the basic health and safety responsibilities of OI, the NRC staff, and the Commission.

It is essential that these two functions be undertaken in a cooperative manner. Ultimately the responsibility for ensuring this, and for reconciling conflicts that arise, rests with the head of the agency. To provide a framework in which this objective can most effectively be achieved, the bill provides a statutory underpinning for the investigative function, delineates OI's responsibilities, and defines OI's relationship to the staff and the head of the agency.

The bill provides the authority for the Assistant Administrator for OI shall report to the Administrator, thereby providing OI with supervisory independence from the regulatory staff. In addition, the bill provides the authority for the Assistant Administrator for OI to initiate an investigation on his or her own initiative, unless the Administrator determines that the public health and safety requires otherwise with respect to a specific investigation.

The Committee rejected the option of transferring the functions of OI to the Office of Inspector General established under subtitle B of this bill. The functions of OI have direct health and safety implications and thus should remain under the supervision of the person with the ultimate responsibility for protecting the public health and safety, the Administrator of the Agency. The Inspector General established under subtitle B, on the other hand, is responsible for auditing and investigating internal agency waste, fraud, and abuse, with no particular emphasis on the implications for the public health and safety. In addition, the fundamental rationale for creating an independent Inspector General—to address appearances of a conflict that arise when the agency investigates itself—

does not apply when the investigative task involves persons outside the agency.

On a related matter, the Committee notes its disagreement with the statement of managers accompanying H.J. Res. 395, the Continuing Resolution for fiscal year 1988, directing the NRC "to consolidate its inspection and examination organizations under the Executive Director in order to assure more efficient and cost effective utilization of staff resources." Pursuant to this statement of managers language, the Commission, effective February 1, 1988, reorganized OI so that it now reports to the Executive Director for Operations.

The Committee's concern is twofold. First, the direction to the Commission in H.J. Res. 395 was included without, so far as can be determined, any consultation with either the Commission or the authorizing committees. Moreover, this language was not contained in either of the appropriations bills passed by the Senate or House. The Committee strongly believes that the statement of managers for an appropriations bill is an inappropriate way to address a matter of this significance.

Second, for the reasons outlined above, the Committee disagrees with the direction provided in the Statement of Managers for H.J. Res. 395. According to the testimony of the Commission before the Committee on October 8, 1987:

> [T]he Commission believes that a strong, competent, and independent OI staffed with experienced investigators is essential to provide investigative facts for use in licensing and enforcement decision when allegations of wrongdoing are raised. A strong OI also helps ensure that the Commission can carry out its statutory mandate in an effective way. However, maintaining the independence of OI must be balanced against the agency need to assure that OI's investigations are focused to provide the information useful to NRC's licensing and enforcement process. An OI reporting directly to the Commission is the best means of accomplishing both of these goals.

Following the enactment of H.J. Res. 395, the Commission advised the Committee, by letter of January 29, 1988 that it preferred "an OI office reporting to the Commission."[34]

SUBTITLE D—NUCLEAR REACTOR SAFETY INVESTIGATIONS BOARD

Subtitle D of this bill establishes a Nuclear Reactor Safety Investigations Board to investigate those significant safety events that the Board determines are important because of possible adverse effects on the public health and safety. The Board may also investigate other safety events upon the request of the Administrator.

The issue of whether an independent safety board is necessary or appropriate has been debated extensively in recent years. For the reasons set forth, the Committee has concluded that an independent Board, as provided in this bill, should be established.

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[34] Letter from Lando V. Zech, Jr., Chairman, Nuclear Regulatory Commission, to Hon. John B. Breaux (Jan. 29, 1988).

The investigation of significant safety events by a Board that is independent of the agency is necessary because of the potential conflict of interest that may arise during the course of an investigation conducted by the agency, when the agency's action or inaction may have been a contributing cause of the accident. To ensure that an investigation is conducted with objectivity and thoroughness, it is necessary to provide that the investigation is conducted by persons whose prior activities are not the subject of the investigation.

In this respect, the Nuclear Reactor Safety Investigations Board is patterned after the National Transportation Safety Board (NTSB). The NTSB is charged with investigating accidents arising from aviation, rail, pipeline, marine, and highway activities, and any other catastrophic accidents involving the transportation of people or property that the NTSB believes should be investigated. It also is directed to make whatever recommendations it believes are necessary to prevent other accidents.

The establishment of an independent Board to investigate significant safety events at nuclear power plants should lead to greater public confidence that these events will be investigated and evaluated in a thorough and objective manner, and that whatever recommendations are appropriate will be made. In turn, this should help ensure that these recommendations will be considered and implemented in a timely manner.

The establishment of the Board is not intended to displace or assume any of the Agency's existing functions for investigation or enforcement. The Agency will retain all of its existing capabilities and responsibilities for the evaluation of information for regulatory and enforcement significance, and for appropriate regulatory or enforcement response.

The bill provides that the Chairperson of the Board shall be appointed by the President, by and with the advice and consent of the Senate. The other two members of the Board shall be appointed by the Administrator of the Agency, on the basis of technical qualification, professional standing, and demonstrated competence and knowledge relevant to the investigative functions of the Board. This manner of appointment of Board members should ensure that the Board will possess the necessary technical competence to investigate and evaluate significant safety events, be familiar with the Agency and its operations, and yet be independent from it.

To further ensure independence, the bill provides that the members of the Board shall serve for three year terms and be removable by the President only for inefficiency, neglect of duty, or malfeasance in office. The Supreme Court has noted that "Once an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey." [35] Thus, the Board members will be independent from the Agency.

The functions of the Board, which are explained in detail in the section-by-section analysis, are limited to conducting investigations and making recommendations. Its functions do not include any authorities or responsibilities relating to regulation or enforcement.

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[35] *Bowsher* v. *Synar*, 106 S.Ct. 3181, 3186 (1986) (quoting *Synar* v. *U.S.*, 626 F. Supp. 1374, 1401 (D.D.C. 1986)) (3-judgecourt).

Finally, the bill authorizes $5,500,000 for fiscal years 1989 through 1993 for the operation of the Board, and for the employment of not more than the equivalent of 55 full-time personnel. These are the funds and personnel that will be necessary for the Board to carry out the responsibilities assigned to it under this subtitle.

TITLE II—AUTHORIZATION OF APPROPRIATIONS FOR FISCAL YEARS 1988 AND 1989

The bill authorizes appropriations for fiscal years 1988 and 1989 in an amount equal to the amounts requested by the Commission in the budget requests for those fiscal years. A total of $427.8 million is authorized for fiscal year 1988 and a total of $450 million is authorized for fiscal year 1989.

The amounts authorized are, in the Committee's view, those amounts necessary for the Agency to carry out an effective and efficient regulatory program. For the the Agency to have a forward-looking program that can improve safety and identify and resolve potential issues prior to events or situations that may require the shutdown of operating facilities, and the resulting imposition of large costs upon consumers and the Agency in order to correct the situation, it is necessary to reverse the trend of the last several years of decreasing budgets for the NRC.

The increase in fiscal year 1989 is necessary, in part, because the Continuing Resolution for fiscal year 1988 appropriated $35 million less than the amount requested by the Commission. The Commission has determined, as it has in the past several years, that most of the reductions required as a result of this funding decrease will be made in the research program. The cumulative effect of these reductions in the research program calls into question whether the resulting level of research can meet the minimal requirements and accomplish the fundamental purpose of any research program—to provide the basic informantion necessary to make rational regulatory decisions in order to protect the public health and safety.

The increase in authorizations for fiscal year 1989 is designed to begin the process of restoring the regulatory and research program to an acceptable level of funding. This level of funding for fiscal year 1989 should provide the Agency with the resources appropriate to carry out its statutory responsibilities.

TITLE III—MISCELLANEOUS PROVISIONS

NOTIFICATION REQUIREMENTS FOR NON-COMPLIANCE

Section 301 of this bill provides that firms constructing, owning, operating, or supplying the components of nuclear power plants and other facilities regulated by the Agency, as the successor to the NRC, and individual directors and responsible officers of such firms, are directly responsible for notifying the Commission of violations or defects that could create substantial safety hazards.

Section 206 of the Energy Reorganization Act of 1974 provides that '[a]ny individual director or responsible officer of a firm constructing, owning, operating, or supplying components of any facility or activity" licensed or regulated under the Atomic Energy Act or the Energy Reorganization Act must immediately notify the Commission of violations of the Atomic Energy Act "or any applicable rule, regulation, order, or license * * * relating to substantial safety hazards, or" of any "defect which could create a substantial safety hazard * * *" (subsection (a)). "Any person who knowingly and consciously fails to provide [this] notice" is subject to a civil penalty (subsection (b)).

The Commission promulgated Part 21 of its regulations to implement section 206. In so doing, the Commission determined that notification of safety hazards could best be assured by requiring affected firms to adopt and implement procedures for proper evaluation of information suggesting potential hazards within the scope of section 206 and for informing directors or responsible officers. The institutional resources of affected firms are thus brought to bear to assure routine compliance. In particular, the regulations require affected firms to establish procedures (1) to evaluate any deviations from technical requirements in order to determine whether there is a defect in a component, or to inform the purchaser so that it may evaluate the deviation or have it evaluated, and (2) to assure that a director or responsible officer is informed of violations and defects.

The regulations also require affected firms to maintain certain records, to permit necessary inspection, to conspicously post section 206 and the regulations implementing it, and, when applicable, to inform suppliers that the regulations apply to them. The Commission has collected a civil penalty from one firm which violated the Commission's implementing regulations.

The Commission has determined that achieving compliance with section 206 requires holding the involved firm primarily responsible for compliance with the Commission regulations delineating the firm's responsibility. However, the Commission's authority for these requirements under section 206 has been questioned.

This provision would clarify the Agency's authority in this area. It would provide a firm statutory basis for the Commission's existing Part 21 regulations and for the imposition of civil penalies for the failure to implement required evaluation and reporting procedures. This should make the approach of section 206 more consistent with the regulatory scheme established under the Atomic Energy Act, which generally imposes responsibility upon the licensee or firm for compliance with the Act and the Commission's regulations.

DISCLOSURE OF SECURITY-RELATED SAFEGUARDS INFORMATION

Section 302 of this bill clarifies that the Commission is authorized to withhold from public disclosure certain categories of sensitive generic safeguards information when the unauthorized disclosure of this information would provide substantial assistance in compromising or negating site-specific security measures required by the Commission pursuant to its statutory responsibilities to protect NRC licensed nuclear materials and facilities against theft, diversion, or sabotage.

Under section 147 of the Atomic Energy Act, as amended, the Commission is authorized to withhold from public disclosure information regarding a licensee's or applicant's sensitive information related to the security of specific nuclear facilities and special nuclear materials (42 U.S.C. 2167). See P.L. 96–295, 94 Stat. 780 (June 30, 1980). The Commission is exempt from any requirements to disclose this information under the Freedom of Information Act.

This provision clarifies that the Commission also is authorized to provide protection for safeguards information in generic studies, analyses, and reports where the release of that information would provide substantial assistance in compromising or negating any of a licensee's specific security measures or procedures as described in subparagraphs (1), (2), and (3) of section 147, as amended, or in targeting for malevolent action a licensee's vital plant equipment as described in subparagraph (3) of section 147. Because the language of the proposed amendment is intended merely to confirm the commission's interpretation of its existing authority, this provision will not significantly increase the ability of the Commission to withhold information from the public.

STORAGE AND DISPOSAL OF LOW-LEVEL RADIOACTIVE WASTE

Section 303 of this bill clarifies that low-level radioactive waste with concentrations of radionuclides that exceed the limits established by the Commission for Class C radioactive waste, as defined by section 61.55 of title 10, Code of Federal Regulations, as in effect on January 26, 1983, ("greater-than-Class C waste") that is owned or generated under license or regulation of the Agency (or an Agreement State) shall not be stored or disposed of except in a facility that is licensed by the Agency (or an Agreement State).

Section 3(b)(1)(D) of the Low-Level Radioactive Waste Policy Amendments Act of 1985, Public Law 99–240 (Jan. 15, 1986) provides that the Federal government shall be responsible for the disposal of greater-than-Class C low-level radioactive waste. That Act defines "disposal" as the "permanent isolation" of such waste, pursuant to applicable regulatory requirements. Additionally, section 3(b)(2) of the Act requires that "[a]ll radioactive waste designated a Federal responsibility pursuant to [section 3(b)(1)(D)] that results from activities licensed by the Nuclear Regulatory Commission . . . shall be disposed of in a facility licensed by the Nuclear Regulatory Commission that the Commission determines is adequate to protect the public health and safety."

In response to the direction contained in the Low-Level Radioactive Waste Policy Amendments Act, the Department of Energy (DOE) submitted a report to Congress entitled "Recommendations for Management of Greater-Than-Class C Low-Level Radioactive Waste." In this report, DOE announced its intention to provide temporary storage for greater-than-Class-C waste generated by NRC licensees.

Because of some apparent confusion over whether such a temporary DOE storage facility, which accepts such waste from NRC licensees, would, in turn, be subject to licensing by the NRC, the bill clarifies that greater-than-Class-C waste that is generated by an NRC or Agreement State licensee shall continue to be subject to such licensing authority when stored or disposed. The bill provides that an Agreement state shall not have licensing authority over a storage or disposal facility operated by the Department of Energy.

This provision does not alter any of the responsibilities for low-level radioactive waste established under the 1985 Amendments Act. The respective responsibilities of the States and Federal Government as delineated in that Act are unaffected by this bill.

REGULATIONS FOR FITNESS FOR DUTY

Section 305 of this bill requires the Administrator of the NSA, within nine months after the date of enactment of this bill, to prescribe regulations which require licensees of operating reactors to establish a program for the testing of those persons employed by such licensees who are responsible for safety-sensitive functions for the unlawful use of alcohol or controlled substances.

The importance to the public health and safety of ensuring that NRC licensee personnel are not impaired, through the use of alcohol or other controlled substances, when performing safety-related duties has been recognized for some time. In 1982, due to the substantial increase during the previous three years in the number of reported drug-related incidents in which nuclear power plant licensee or contractor employees were arrested or terminated, the NRC staff first recommended that the Commission promulgate a regulation to address the drug and alcohol problem for those personnel with unescorted access to protected areas of nuclear power plants. (For a more detailed history of the Commission's deliberations regarding a fitness for duty rule, see Appendix 3.)

The Commission approved the publication of the proposed rule, and subsequently approved publication of a final rule, but then determined that a policy statement rather than a regulation should be issued to address this issue. In its policy statement the Commission stated its rationale for addressing this issue:

> The [NRC] recognizes drug and alcohol abuse problems to be a social, medical, and safety problem affecting every segment of our society. Given the pervasiveness of the problem, it must be recognized that it exists to some extent in the nuclear industry. Prudence, therefore, requires that the Commission consider additional appropriate measures to provide reasonable assurance that a person who is under the influence of alcohol or any substance legal or illegal which affects that person's ability to perform duties safety, is not allowed access to a vital area at a nuclear power plant.[36]

Presently, the Commission's policy statement provides that all utility licensees should have a fitness for duty program that conforms to the guidelines set forth by the Edison Electric Institute (an industry trade association). The Commission also stated that it would defer rulemaking on this issue subject to successful implementation by the industry of the fitness for duty programs described in the policy statement.

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[36] Commission policy statement on fitness for duty of nuclear power plant personnel, 51 Fed. Reg. 27921 (Aug. 4, 1986).

More recently, however, in December, 1987, the Commission directed the staff to prepare a proposed fitness for duty rule. The staff submitted the proposed rule to the Commission on May 10, 1988.

As the Commission has stated, it is essential that the performance of nuclear power plant personnel in safety-sensitive functions not be impaired by alcohol or controlled substances. Any impairment of personnel with safety-sensitive responsibilities could have serious adverse consequences for the public health and safety.

Accordingly, the bill requires the Agency to promulgate regulations that would require those persons operating a production or utilization facility licensed under section 103 or 104 of the Atomic Energy Act of 1954, as amended, to institute programs for the testing of those persons employed by the licensee in safety-sensitive functions, as determined by the Administrator, to ensure that such employees are not improperly using drugs or alcohol without lawful authorization.

SECTION-BY-SECTION ANALYSIS

There follows a section-by-section analysis of the legislation, accompanied by discussion, where appropriate.

SECTION 1: SHORT TITLE

The short title of the bill is the "Nuclear Regulation Reorganization and Reform Act of 1988".

TITLE I—REORGANIZATION AND REFORM OF NUCLEAR ENERGY REGULATION

SUBTITLE A—NUCLEAR SAFETY AGENCY

Section 101: Declaration of purposes

Section 101 contains a congressional declaration that a clear and coordinated national policy for the development, use, and regulation of atomic energy for peaceful purposes, in accordance with the objectives of the Atomic Energy Act of 1954, as amended, is in the best interest of the general welfare and the common defense and security of the Nation. This section also declares that improvements in the effectiveness of the current approach to the regulation of atomic energy for peaceful purposes are required to achieve this policy objective.

Section 102: Definitions

Section 102 sets forth two definitions for the purposes of this Act. It defines the term "Agency" as the Nuclear Safety Agency established pursuant to section 103, and the term "Administrator" as the Administrator of the Nuclear Safety Agency, appointed pursuant to section 104.

Section 103: Establishment of Nuclear Safety Agency

Section 103 establishes the Nuclear Safety Agency, hereinafter referred to as the Agency, as the successor of the Nuclear Regulatory Commission in existence on the day before the effective date of this Act. This section also transfers to the Agency all of the functions of the Nuclear Regulatory Commission, except those functions otherwise transferred under subtitle B (section 121) of this Act.

This section of the bill also provides that for the purposes of title 5 of the United States Code, this new agency shall be treated as an Independent Establishment, defined at 5 U.S.C. 104.

Section 103(d)(1) provides that the Agency shall keep the committees of the Senate and the House of Representatives which, under the rules of the Senate and House, have jurisdiction over the functions of the Agency, fully and currently informed with respect to the activities of the Agency. This requirement was first applied by the Congress to the Atomic Energy Commission (in section 201 of the Atomic Energy Act of 1954, as amended) and subsequently to the Nuclear Regulatory Commission (in Public Law 95-110, which added Chapter 20 to the Atomic Energy Act of 1954) and is intended to apply to the NSA in the same manner, and to the same extent, notwithstanding that the NSA is an independent establishment within the Executive Branch.

Section 103(d)(2) requires the Administrator of the Agency to submit to the Congress copies of budget estimates, requests, and information (including personnel needs), legislative recommendations, prepared testimony for congressional hearings, and comments on legislation at the same time they are sent by the Agency to either the President or the Office of Management and Budget. This provision is not intended to modify either the authority of the President to make modifications to such documents before they are transmitted to the Congress as a formal submission of the President or the requirement that the Agency keep the appropriate committees of the House and Senate fully and currently informed of the agency's activities.

Finally, section 103(d)(3) of the bill provides that for the purposes of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), any Executive Order promulgated pursuant to or for the purpose of implementing such Act, and specifically for the purposes of Executive Orders 12498 and 12291, the Agency shall be treated in the same manner as an independent regulatory agency as defined in that Act. The purpose of this provision is to ensure that the new agency, for the purposes of the Paperwork Reduction Act and the enumerated Executive Orders (which require all federal agencies other than independent regulatory agencies to submit annual regulatory agendas and proposed rules and regulations to OMB for review, cost-benefit analysis, and approval), be treated in the same manner as the Nuclear Regulatory Commission.

The Committee is of the view that such a review by OMB is inappropriate in the context of the regulation of nuclear materials. In view of the highly technical nature of the activities regulated by the agency and the corresponding expertise necessary for the agency to carry out its statutory mandate, the Committee believes that the substantive decision making authority should be vested in the agency. In addition, the Commission has already established a detailed procedure for assessing the costs and benefits of proposed regulatory actions. This process will carry forward to the NSA. Accordingly, any additional review would simply duplicate steps already taken by the agency.

Section 104: Officers

Section 104 creates two principal officers for the Agency, an Administrator and Deputy Administrator. Both officers are to be appointed by the President, by and with the advice and consent of the Senate. Both of these officers will serve at the pleasure of the President.

The Administrator who is responsible for carrying out all functions transferred to the agency by this Act and who shall have the authority and control over all personnel, programs, and activities of the Agency, shall be compensated at a rate applicable to Level II of the Executive Schedule. The Deputy Administrator, who shall perform such functions as the Administrator prescribes and who shall act for and perform the functions of the Administrator during the absence or disability of the Administrator, or in the event of a vacancy in the office of the Administrator, shall be compensated at a rate applicable to Level III of the Executive Schedule.

Section 105: Abolition of Nuclear Regulatory Commission

Section 105 repeals sections 201 and 209 of the Energy Reorganization Act of 1974. In so doing, this section of the bill repeals the statutory provisions which established the Nuclear Regulatory Commission, including the offices of the Commissioners, as well as the Office of the Executive Director for Operations.

Section 106: Transfer and allocation of appropriations and personnel

Section 106 provides for the transfer and appropriate allocation of personnel employed and the assets, liabilities, contracts, records, and unexpended balances of appropriations, authorizations, allocations, and other funds employed, held, used, arising from, available, or to be made available, in connection with the Nuclear Regulatory Commission to the Agency. This transfer and allocation is subject to the provisions of 31 U.S.C. 1531, which provides, generally, that when the transfer or assignment of a function or activity is internal to an agency, the decision as to the amount of available appropriations that is to be transferred rests with the agency head, with the approval of the President. When such transfer and assignments are made from one agency to another, this decision rests with the President.

Section 107: Effect on personnel

Section 107 provides that the transfer of personnel pursuant to this Act shall not cause any employee so transferred to be separated or reduced in grade or compensation for at least one year after the date of the transfer. This section of the bill also provides that any person who, on the day before the effective date of this Act, held a position compensated in accordance with the Executive Schedule prescribed in chapter 53 of title 5 of the United States Code, and who, without a break in service, is appointed to a position in the new Agency with duties comparable to those performed immediately preceding the appointment, shall continue to be compensated in the new position at not less than the rate provided for in the previous position for the duration of service in the new position.

Section 108: Incidental transfers

Section 108 authorizes the Director of the Office of Management and Budget, at such time or times as the Administrator shall provide, to make necessary determinations regarding the transfer of the Nuclear Regulatory Commission and its functions pursuant to this Act, and to make additional incidental dispositions of personnel, assets, liabilities, grants, contracts, property, records, and unexpended balances of appropriations, authorizations, allocations, and other funds as may be necessary to carry out the provisions of this Act.

In addition, this section authorizes the Director of the Office of Management and Budget, after consultation with the Director of the Office of Personnel Management, to make necessary determinations with regard to the transfer of positions within the Senior Executive Service in connection with the transfer of the Nuclear Regulatory Commission and its functions pursuant to this Act.

Section 109: Savings provisions

Section 109 contains a series of savings provisions that provide for the orderly transition of the activities of the Nuclear Regulatory Commission to the new Nuclear Safety Agency. Subsection (a) contains the general rule that all orders, determinations, rules, regulations, permits, contracts, certificates, licenses, and privileges that have been issued, made, granted, or allowed to become effective by the President, the NRC, or any court of competent jurisdiction, in the performance of the functions transferred to the Agency in accordance with this Act and which are in effect at the time this Act takes effect, shall continue in effect until modified, terminated, suspended, set aside or repealed by the President, the Administrator of the NSA, a court of competent jurisdiction, or operation of law.

Paragraph (b)(1) provides that the provisions of this Act shall not affect any proceeding pending before the NRC at the time this Act takes effect and provides that such proceedings, as they relate to functions transferred pursuant to this Act shall be continued before the NSA. Orders may be issued in such proceedings, appeals may be taken on such orders, and payments may be made pursuant to such orders, as if this Act had not been enacted. In addition, any orders issued in such proceedings shall continue in effect until modified, terminated, superceded, or repealed by the Administrator of the NSA, by a court of competent jurisdiction, or by operation of law.

Paragraph (b)(2) authorizes the Administrator to promulgate regulations providing for the orderly transition of any proceeding continued pursuant to and in accordance with the authority of the preceding paragraph.

Subsection (c) provides that, except as provided in subsection (e) of this section, the provisions of this Act shall not affect actions commenced prior to the effective date of this Act and in all such actions, proceedings shall be had, appeals may be taken, and judgments may be rendered, in the same manner and effect as if this Act had not been enacted.

Subsection (d) provides that no action commenced by or against an officer of the Nuclear Regulatory Commission shall abate by reason of the enactment of this Act. No cause of action by or against the NRC or the functions transferred by this Act, or by or against any officer of the NRC in such officer's official capacity shall abate by reason of the enactment of this Act. Causes of action or proceedings against the NRC may be asserted against the United States or an official of the NSA, as appropriate, and in any action pending when this Act takes effect, the court may at any time, on its own motion or that of any party, enter an order which will give effect to the provisions of this subsection.

Subsection (e) provides that if, before the date on which this Act takes effect, the NRC, or any officer thereof in the official capacity of such officer, is a party to an action under this Act, such action shall be continued with the Administrator or other appropriate official of the NSA, as the case may be, substituted or added as a party.

Subsection (f) provides that any order or action of the Administrator in the exercise of functions transferred under this Act shall be subject to judicial review to the same extent and in the same manner as if such orders or actions had been taken by the NRC in the exercise of the function immediately preceding the transfer. Finally, this subsection provides that any statutory requirements relating to notice, hearings, actions upon the record, or administrative review that apply to the exercise of any such functions transferred under this Act shall continue to apply to the exercise of such functions by the Administrator.

Section 110: Reference

Section 110 provides that with respect to any function transferred under this Act and exercised after the effective date of this Act, any reference in any other law, rule, regulation, certificate, directive, instruction, or other official paper in force on the effective date of this Act to the Nuclear Regulatory Commission shall be deemed to refer and apply to the Nuclear Safety Agency or the Administrator of that Agency.

Section 111: Effective date

Section 111 provides that the provisions of this Act shall take effect one hundred and twenty days after the date of its enactment, or on such earlier date that the President may prescribe and publish in the Federal Register. At any time after the date of enactment, however, any of the officers provided for in section 104 of this Act may be nominated and appointed, as set forth in this Act. Any funds available to the Nuclear Regulatory Commission may, with the approval of the President, be used to pay the compensation and expenses of any officer so appointed as well as the other transitional and planning expenses association with the establishment of the Agency until such time as funds for such purposes are otherwise available.

Section 112: Conforming changes

Section 112 contains conforming changes to the Energy Reorganization Act of 1974 by redesignating the directors of the NRC's Offices of Nuclear Reactor Regulation, Nuclear Material Safety and Safeguards, and Nuclear Regulatory Research as Assistant Administrators within the new Nuclear Safety Agency. [Note that subtitle C of this bill also establishes an Assistant Administrator for Investigations.]

Section 113: Construction authorization for waste repository

Section 113 contains provisions that establish procedures for the review of any application for the authorization for the construction of a high level nuclear waste repository that is presented to the Nuclear Safety Agency by the Department of Energy pursuant to the Nuclear Waste Policy Act of 1982, as amended (42 U.S.C. 10101 *et seq.*). These procedures are intended to ensure that the agency's process for the consideration of such an application is conducted in an independent manner comparable to the independent nature of the review that would occur under current law by the Nuclear Regulatory Commission. This section does not change existing standards for considering or ruling on the application, but merely reflects the fact that this important decision will now be made not by the Commission, but by an agency that is headed by an individual who serves at the pleasure of the President.

To accomplish this objective, section 113 amends section 191 of the Atomic Energy Act of 1954, as amended, by adding a new subsection (c) to that provision. Pursuant to paragraph (c)(1) of this new subsection, the Administrator of the NSA is directed, upon the receipt of an application for a construction authorization pursuant to 42 U.S.C. 10134(b), to establish a special licensing board to review the application. This licensing board, to be comprised of three members, shall include one person qualified in the conduct of administrative proceedings and two persons selected from among a pool of six persons nominated by the Nuclear Waste Technical Review Board (hereinafter in this discussion referred to as the "Board") that was established pursuant to Public Law 100-202. The members appointed to this licensing board shall serve for such time as may be necessary to consider and act upon the application.

Paragraph (c)(2) of the new subsection directs that the Nuclear Waste Technical Review Board shall, not later than 60 days after the date on which the recommendation of a waste repository site designation becomes effective under 42 U.S.C. 10135, nominate the six persons from whom the Administrator of the NSA is to select two. Persons nominated by the Board are required to have such technical or other qualifications as the Board deems appropriate as to the issues before the licensing board during its consideration and action on the application.

Finally, paragraph (c)(3) of the new subsection provides that the issuance of a final decision by this specially created licensing board, including any procedural or interlocutory appeals decided by any internal appellate panel that might be established by the Administrator, shall either be affirmed by the Administrator as the final agency action, or remanded to the licensing board for further consideration if the Administrator determines that the decision is unsupported by substantial evidence on the record. This provision does not, however, provide the Administrator with the authority to overturn or modify in any other way the licensing board's decision.

SUBTITLE B—OFFICE OF INSPECTOR GENERAL

Section 121: Office of Inspector General

Section 121 amends the Inspector General Act of 1978 [37] and establishes an independent Office of Inspector General for the new Nuclear Safety Agency. The Inspector General of the NSA, which will assume all of the functions of the Office of Inspector and Auditor within the Nuclear Regulatory Commission as of the effective date of this Act, will be responsible for auditing agency programs and investigating allegations of waste, fraud, and abuse by Agency personnel and contractors. The head of this office will be appointed by the President with the advice and consent of the Senate.

As more fully provided in the Inspector General Act, the Inspector General for the Nuclear Safety Agency would: report directly to the Administrator or Deputy Administrator of the NSA; be empowered to conduct independent audits and investigations on his or her own initiative, with broad authority to obtain information in aid of such audits and investigations; be authorized to select, appoint, and employ such persons as necessary to carry out the functions of the Office; and be removable only by the President after notice to the Congress.

SUBTITLE C—OFFICE OF INVESTIGATIONS

Section 131: Office of Investigations

Section 131 amends the Energy Reorganization Act of 1974 to establish within the Nuclear Safety Agency an Office of Investigations. This section also requires the Nuclear Regulatory Commission and the Department of Justice to enter into a Memorandum of Understanding to establish procedures for the coordination of criminal investigations into activities licensed or regulated by the Commission.

Subsection (a) of this section adds a new Section 205A. to the Energy Reorganization Act, subsection (a) of which establishes, within the NSA, an Office of Investigations that is to be headed by an Assistant Administrator. The Assistant Administrator shall be appointed by the Administrator and shall report directly to the Administrator.

Subsection (b) of the new section 205A. provides that the Assistant Administrator shall perform such functions as the Administrator designates, which shall include investigations into possible violations of the Atomic Energy Act, the Energy Reorganization Act, any other statue that the Administrator is responsible for implementing, as well as any rules, regulations, order, or license condition issued by the Agency that may involve intent or purpose to commit such violations, or that may have arisen as a result of careless disregard, deception, or other indications of willful intent.

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[37] 5 U.S.C. App. 3, Sec. 1 *et seq.*

Subsection (c) of the new section 205A. authorizes the Assistant Administrator to intitiate an investigation at the request of the Administrator, Deputy Administrator, or a Regional Administrator of the NSA. In addition, unless the Administrator of the NSA determines that the public health and safety requires otherwise with respect to a particular investigation, the Assistant Administrator is authorized to initiate an investigation on the Assistant Administrator's own motion. The Committee anticipates that those instances in which the Administrator determines that an overriding public health and safety need outweighs a decision by the Assistant Administrator to investigate an allegation of wrongdoing will be exceedingly rare. Indeed, as more fully laid out in the Appendix 2 to this report, the Committee is unaware of even one instance when the Nuclear Regulatory Commission has ordered the existing Office of Investigations (created by the NRC in 1982) to halt an investigation. The Committee expects the Administrator of the new NSA to exercise the same judicious use of this authority.

Subsection (d) of the new section 205A. requires any employee of the Nuclear Safety Agency who obtains information concerning a violation that falls within the scope of authority of the Office of Investigations, to promptly provide such information to the Office.

Subsection (e) of the new section 205A. authorizes the Assistant Administrator, whenever reasonable grounds exist to believe that there has been a violation of federal criminal law, to report such violation to the Attorney General, after notifying the Administrator. The Committee stresses that the notification requirement is not to be interpreted as requiring prior approval by the Administrator for any referral that the Assistant Administrator believes necessary. For that reason, this subsection provides that neither the Administrator nor any other employee of the Agency shall prevent or prohibit the Assistant Administrator from making such a report.

Finally, subsection 131(b) requires the NRC and the Attorney General, within 90 days of enactment of this Act, to enter into a Memorandum of Understanding to: provide for the coordination of matters that could lead both to civil enforcement action by the Commission as well as criminal prosecution by the Attorney General; provide decision procedures and schedules with respect to action on matters referred to the Attorney General; and facilitate the exchange of information relating to matters within the respective jurisdiction of the Agency and the Department of Justice.

These provisions should help ensure that the Federal Government has adequate capabilities to investigate and prosecute criminal violations related to the Atomic Energy Act, while at the same time ensuring that the public health and safety is adequately protected.

SUBTITLE D—NUCLEAR REACTOR SAFETY INVESTIGATIONS BOARD

Section 141: Findings and purpose

Section 141 contains the statements of congressional findings and purpose regarding the creation of a Nuclear Reactor Safety Investigations Board. Subsection (a) contains three principal findings: (1) a potential conflict of interest exists for the investigation of significant safety events by the Nuclear Safety Agency where the Agency's prior actions or inactions may have been a partial contributor to the cause of the event; (2) an independent investigation of such events will inspire greater public confidence in the ultimate determination regarding the cause of the event; and (3) the increased stature and enhanced visibility of investigations conducted by an independent organization, and the recommendations made by that organization, will help to ensure the timely implementation of those recommendations.

Subsection (b) states that the purpose of this subtitle is to establish a Nuclear Reactor Safety Investigations Board capable of conducting independent investigations of significant safety events arising out of activities at production and utilization facilities licensed by the Agency pursuant to sections 103 or 104 of the Atomic Energy Act of 1954, as amended. In addition, the Board is to submit the results of its investigations to the Administrator and the Congress, with any recommendations for actions to be taken by the Administrator to prevent the recurrence of such events.

Section 142: Establishment of board

Section 142 provides for the establishment of the Nuclear Reactor Safety Investigations Board, hereinafter referred to as the Board. Subsection (a) creates the Board as an independent entity within the Nuclear Safety Agency.

Subsection (b) provides that the Board shall be composed of three members, including a chairperson who shall be appointed by the President by and with the advice and consent of the Senate. The other two members of the Board are to be appointed by the Administrator of the Nuclear Safety Agency. This subsection provides that all three members of the Board shall be appointed on the basis of technical qualification, professional standing, and demonstrated competence and knowledge relevant to the investigative functions of the Board. The Committee emphasizes that these positions are to be filled by highly qualified, trained professionals. The Board is not entrusted with policy-making or regulatory functions, but is designed to be an entity that determines the facts, conditions, and circumstances surrounding significant safety events. The Committee therefore expects these individuals to have detailed knowledge about nuclear power systems and a demonstrated ability in the Board's investigative functions. The President should submit the nomination for the chairperson of the Board not later than ninety days after the date of enactment of this Act.

Subsection (c) provides that the term of each Board member shall be for three years. A member of the Board may only be removed by the President upon a determination that the member has been inefficient, neglectful of duty, or guilty of malfeasance in office. These two provisions are central to ensuring that the Board will be able to carry out its activities in an independent manner. This subsection also provides that any Board member appointed to fill a vacancy prior to the expiration of the term of office for which his or her predecessor was appointed shall be appointed only for the remainder of the predecessor's term. In addition, any Board member that has been duly appointed and whose term has expired shall continue to serve in that office until a successor has been appointed and qualified.

Subsection (d) provides that the chairperson of the Board shall be its chief executive officer and shall exercise the executive and administrative functions of the Board with respect to the appointment and supervision of personnel employed by the Board, the distribution of business among such personnel and any administrative units created by the Board, and the use and expenditure of funds. This subsection also provides that the chairperson shall be compensated at the rate applicable to Level III of the Executive Schedule.

Section 143: Duties and authorities

Section 143 establishes the duties and authorities of the Board. Under paragraph (a)(1), the Board is authorized to investigate or cause to be investigated those significant safety events arising out of activities at production and utilization facilities licensed by the Nuclear Safety Agency pursuant to sections 103 or 104 of the Atomic Energy Act of 1954, as amended, which the Board determines are important because of possible adverse effects on public health or safety of the public.

The Committees emphasizes the following. The Board, not the Nuclear Safety Agency, shall determine whether a particular event meets the threshold. The Committee expects that the Board will publish guidelines and procedures for determining which events meet the statutory threshold and how the Board will make such determinations. The Board should make use of the expertise of the staff of the Nuclear Safety Agency and other experts familiar with nuclear power systems in developing these guidelines and procedures.

In addition, this paragraph grants to the Board the authority to investigate any other event upon the request of the Administrator of the Agency.

Paragraph (a)(2) sets forth the purposes of Board investigations. The bill provides that the Board shall determine the facts, conditions, and circumstances of those safety events it investigates, including an assessment of the implications of the particuilar event investigated for public health and safety, as well as a determination of whether the event investigated is part of a pattern of similar events at other products or utilization facilities which could have adverse affects upon the public health and safety.

Paragraph (a)(3) requires the Board to submit a written report at the conclusion of each investigation to the Administrator. Each report shall include at a minimum and place of the event, the nature and probable consequence of the event, the cause or causes of the event, and any action or actions recommended by the Board to prevent a recurrence of the event or similar events, including any recommendations for actions to be taken by the Administrator with respect to regulatory requirements or practices.

Paragraph (a)(4) requires the Administrator to respond in writing to the report of the Board within 120 days of the receipt of the report. The Administrator's response shall detail the specific measures adopted or to be adopted by the Administrator in response to recommendations made by the Board. This response of any action that the Administrator cannot adopt within the relevant time frame. In addition, the Administrator shall explain to the Board the basis for not adopting any recommendation.

This paragraph also requires that the recommendations of the Board pursuant to paragraph (a)(3) and the response of the Administrator pursuant to this paragraph to be made available to the public and submitted to the Congress.

Paragraph (a)(5) defines the term "significant safety event" as an event that involves either: a moderate exposure to, or release of, radioactive material from a production or utilization facility; a major degradation of essential safety-related equipment at such a facility; or a major deficiency in the design, construction, use of, or management controls at such a facility. Examples of events that the NRC has determined meet this threshold are set forth in Appendix 10.

Paragraph (a)(6) requires the Board to consult with the Administrator prior to the initiation of an investigation pursuant to this subsection. If, as a result of such consulation, the Board determines that an investigation is warranted, the Board shall set forth in writing the basis for such a determination. The Committee stresses that this consultation process, and the development of a written statement, are not meant to either unduly delay an investigation that is clearly warranted or to otherwise impinge on the freedom of the Board to make its own determination about the safety significant of a particular event. Rather, these requirements are designed to foster a certain level of communication and cooperation between the Board and the Agency in the assessment of the safety signficance of operating events at production or utilization facilities and to minimize duplication between the Board and the Agency.

Furthermore, this paragraph provides that the written determination of the Board to investigate a particular event shall not be subject to judicial review. The written statement of the Board shall be made available to the public and submitted to the Congress.

Paragraph (a)(7) provides that no part of the conclusions, findings, or recommendations of any Board report, relating to an event or the investigation of an event, shall be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in the report. This provision, patterned after a similar provision in the statute creating the National Transportation Safety Board [37] is intended to facilitate the conduct of Board investigations. This does not mean though that the information gathered by the Board, or any conclusions reached by parties other than the board that are based upon such information cannot subsequently be used in such a proceeding. Instead, the provision is intended to permit the board to make findings, conclusions, and recommendations without concern that such findings, conclusions, or recommendations might subsequently be used in litigation.

Subsection (b) authorizes any employee of the Board, after an investigation has been appropriately commenced, and upon the presentation of appropriate credentials (including required security clearances and notice of inspector authority) to enter the facility where an event has occurred and do all things appropriate for an

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[38] 49 U.S.C. 1901 *et seq.*

investigation pursuant to the Board's authority. In addition, this subsection authorizes such employees to inspect, at reasonable times the records, files, papers, processes, controls, and facilities relevant to the investigation of the event. Each inspection shall be commenced and completed with reasonable promptness.

Subsection (c) authorizes the Board, subject to the provisions of 5 U.S.C. 552a, which sets forth certain restrictions on the release of records maintained by the agencies on individuals, to secure directly from any agency or instrumentality of the United States such information as that agency or instrumentality may already possess to carry out an investigation pursuant to this subtitle. The information that must be provided includes any material and information classified pursuant to the Atomic Energy Act of 1954, as amended, or any information or material designated as safeguards information and otherwise protected from disclosure pursuant to Section 147 of the Atomic Energy Act.

Paragraph (d)(1) authorizes the Board, any duly authorized member of the Board, any administrative law judge employed by or assigned to the Board, or any officer or employee duly designated by the Board, to hold such hearings, sit and act at such times and places, administer such oaths, and require by subpoena or otherwise the attendance and testimony of such witnesses and the production of evidence as is deemed necessary for the conduct of an investigation as required to implement this subtitle. Subpoenas shall be issued only under the signature of the Chairperson of the Board and may be served by any person designated by the Board.

Paragraph (d)(2) provides that any person who willfully neglects or refuses to qualify as a witness, or to testify, or to produce any evidence in obedience to any duly issued subpoena is subject to a fine of not more than $5,000, or imprisonment for not more than six months, or both. This paragraph also authorizes the United States Attorney for any judicial district in which any person, who has been certified by the Board to be in willful disobedience of such a subpoena, resides, to proceed with the prosecution of such person for this offense.

Paragraph (e)(1) authorizes the Board to appoint and fix the pay of such officers and employees as the Board considers necessary to carry out its powers and duties. Appointments shall be made in such a manner that not more than the equivalent of 55 full-time officers and employees are employed at any one time.

Paragraph (e)(2) provides that staff appointments to the Board shall be subject to the privisions of title 5 of the United States Code and shall be compensated in accordance with the provisions of chapter 51 and subchapter III of chapter 53 of such title, which set forth the job classifications and General Schedule pay rates for most government employees.

Subsection (f) authorizes the Board to obtain temporary and intermittent consultant services, as provided in 5 U.S.C. 3109(b), which shall not exceed, during any fiscal year, the amount of services that would be obtained if the Board procured on a full-time basis the services of twelve consultants. Individuals whose services are obtained by the Board pursuant to this authority shall not receive rates that exceed the basic pay schedule for GS–18 of the General Schedule.

Paragraph (g)(1) authorizes the Administrator of the Nuclear Safety Agency or the head (or governing authority) of any other federal agency or instrumentality, upon the request of the Board, to detail to the Board, on a reimbursable basis, such personnel as may be desirable to assist the Board in carrying out its duties. In addition, such entities may make available to the Board, on a reimbursable basis, such facilities, equipment, or other administrative support services as may be desirable to assist the Board.

Paragraph (g)(2) requires the Administrator of the NSA to provide the Board with appropriate and adequate office space, together with equipment, office supplies, and communications facilities and sevices as may be necessary for the operation of the Board.

Subsection (h) authorizes the Board to confer with State and local government agencies and employees and to use, on a reimbursable basis, such services, records, and facilities as such agencies make available.

Subsection (i) authorizes the Board to use the United States mails in the same manner and under the same conditions as other departments and agencies of the United States.

Subsection (j) requires the Board to submit an annual report to the Congress. This report, which is in addition to the reports on specific investigations that the Board is required to submit, must contain a summary of the events investigated by the Board during the previous calendar year and a summary of the recommendations made by the Board to the Administrator of the NSA during that year and the observed response of the Administrator to such recommendations. These reports shall be made available to federal, State, and local government agencies concerned with safety at production or utilization facilities licensed by the Nuclear Safety Agency. Upon request, these reports shall be made available to other interested persons.

Section 144: Transfer of functions

Section 144 authorizes the Administrator of the Nuclear Safety Agency to transfer to the Board such offices of the Agency, or functions, powers, or duties of such offices, as the Administrator determines are properly related to the functions of the Board and that will further the purposes of this Act. While the decision of which functions, power, or duties are to be transferred rests with the Administrator, the Committee expects that the Administrator, in making such decisions, will seek to minimize the potential for duplication and overlap. At the same time, the Committee expects that the Administrator will ensure that the Agency retains those functions, powers, and duties necessary for the Agency to carry out its responsibilities. This section prohibits the Administrator from transferring, under the authority of this section, any program responsibilities to the Board.

Section 145: Authorization

Section 145 authorizes the appropriation of $5,500,000 for each of fiscal years 1988 through 1993 to the Board. This section further provides that the authority for the Board shall terminate at the end of fiscal year 1993, unless modified or extended by the Congress.

SUBTITLE E—SEPARABILITY

Section 151

Section 151 provides that if any provision of title I, or the application of any such provision to any person or circumstance, is held invalid, the remainder of this title, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

TITLE II—AUTHORIZATION OF APPROPRIATIONS FOR FISCAL YEARS 1988 AND 1989

Section 201

Section 201 authorizes, in accordance with the provisions of section 261 of the Atomic Energy Act of 1954, as amended, and section 305 of the Energy Reorganization Act of 1974, the appropriation of $427,800,000 for fiscal year 1988 and $450,000,000 for fiscal year 1989.

Section 202

Section 202(a) allocates the funds as follows.

For fiscal year 1988: not more than $154,460,000 shall be used for "Nuclear Reactor Regulation"; not more than $46,955,000 shall be used for "Nuclear Materials Safety and Safeguards"; not more than $132,396,000 shall be used for "Nuclear Regulatory Research"; not more than $52,084,000 shall be used for "Program Technical Support"; and not more thn $41,905,000 shall be used for "Program Direction and Administration".

For fiscal year 1989: not more than $151,622,000 shall be used for "Reactor Safety and Safeguards Regulation"; not more than $137,117,000 shall be used for "Nuclear Safety Research"; not more than $30,586,000 shall be used for "Nuclear Material Safety and Safeguards Regulation"; not more than $22,394,000 shall be used for "Nuclear Waste Regulation"; not more than $40,965,000 shall be used for "Special and Independent Reviews, Investigations and Enforcement"; and not more than $67,316,000 shall be used for "Nuclear Safety Management and Support".

Subsection (b) of this section provides that not more than one percent of the funds appropriated in either fiscal year 1988 for "Nuclear Regulatory Research" or in fiscal year 1989 for "Nuclear Safety Research" may be used by the Agency, in exercising its authority pursuant to Section 31a. of the Atomic Energy Act of 1954, as amended, to enter into grants and cooperative agreements with universities. Grants and cooperative agreements entered into pursuant to this authority must be consistent with the Federal Grant and Cooperative Agreement Act of 1977 and other applicable law.

Subsection (c) of this section allows the Administrator of the Agency to reallocate any of the funds appropriated pursuant to subsection (a) of this section for use in a program referred to in any other paragraph of that section, or for use in any other activity within a program. This subsection restricts the Administrator's discretion to order such reallocation, however, to amounts less than $500,000, unless any increase or decrease in excess of this amount has been fully noticed by the Administrator to the appropriate

Committees of the House of Representatives and the Senate and a period of 30 calendar days after such notice passes (excluding those days when the House or Senate is not in session because of an adjournment of more than three calendar days to a day certain or an adjournment sine die) or, each such Committee, before the expiration of such period, transmits to the Administrator a written notification that such Committee does not object to the proposed reallocation.

Section 203

Section 203 provides authorization for monies received by the Agency for cooperative nuclear safety research programs and for the material and information access authorization programs, including criminal history checks under Section 149 of the Atomic Energy Act of 1954, as amended, to be used as salaries and expenses associated with those activities, and for such funds to remain available until expended, notwithstanding the provisions' of Section 3302 of title 31 of the United States Code.

Section 204

Section 204 provides authorization during fiscal years 1988 and 1989 for the transfer of amounts appropriated to the Agency to other agencies of the federal government for salaries and expenses for the performance by such agencies of activities for which the appropriation to the Agency had been made. Any sums so transferred may be merged with the appropriation of the other agency to which such sums are transferred.

Section 205

Section 205 makes clear that the amounts authorized for fiscal years 1988 and 1989 may only be spent when appropriated in advance.

TITLE III—MISCELLANEOUS PROVISIONS

Section 301: Notification requirements for noncompliance

Section 301 amends section 206 of the Energy Reorganization Act of 1974, which grants the NRC the authority to assess civil penalties against directors and responsible officials of firms that construct, own, operate or supply parts for NRC regulated activities or facilities when such persons knowingly and consciously fail to notify the NRC of noncompliance with regulations relating to substantial safety hazards or defects.

This section of the bill would extend the notification requirements to firms, requiring both the firm and the responsible officers and directors to notify the Nuclear Safety Agency (NSA), the successor agency of the NRC, of noncompliance with regulatory requirements. It also clarifies the authority of the NSA to conduct necessary inspections and investigations related to the issue of compliance.

This provision would amend subsection (a) of section 206 by providing that firms, in addition to individual directors and responsible officers of such firms, are responsible for notifying the Commission of violations or defects that could create substantial safety hazards. This assignment of responsibility is more in accord with the general approach to regulation under the Atomic Energy Act of 1954, as amended, which imposes responsibility on the licensee for compliance with the Act and the existing Commission's regulations, rather than on an individual officer or director.

This section of the bill also amends subsection (b) of section 206 and confirms the authority of the agency to implement the above noted requirement by regulation or order. Again, this provision more closely parallels the authority provided the agency under the Atomic Energy Act of 1954, as amended, to prescribe such regulations or orders as it may deem necessary to carry out its regulatory mission.

The amendments to existing law contained in the new subsection (c) clarify that any firm or individual subject to the provisions of this section who violates any regulation or order promulgated or issued pursuant to subsection (b), above, shall be subject to a civil penalty as set forth in section 234 of the Atomic Energy Act of 1954, as amended.

Subsection (d) of this section provides that the requirements of this section are to be prominently posted on the premises of any firm subject to the provisions of this section. This provision is an expansion of existing law which requires such posting on the premises of firms licensed or regulated under the Atomic Energy Act. Thus, this provision would cover suppliers of components and other firms who are covered by Section 206, but which are not licensed or regulated firms under that Act.

Subsection (e) clarifies that the Commission may conduct inspections, investigations, and other enforcement activities as needed to ensure compliance with the provisions of this section and any regulations or orders promulgated or issued pursuant to it.

Finally, this section of the bill defines the term "firm" in a manner that parallels the broad coverage provided for the term "person" in Section 11 s. of the Atomic Energy Act of 1954, as amended. Moreover, this provision specifically includes the Department of Energy as a "firm" for the purposes of this section, to the extent that the Department's facilities, materials, or activities are licensed by the agency.

Section 302: Disclosure of security-related safeguards information

Section 302 amends section 147 of the Atomic Energy Act of 1954, as amended. That section of existing law, enacted as Section 207 of the NRC Authorization Act for fiscal year 1980 (P.L. 96-295), generally provides authority to the Commission to exempt from disclosure under the Freedom of Information Act (FOIA) sensitive information relating to the security of specific nuclear facilities and special nuclear materials that must be provided to it by a licensee or applicant.

Since the enactment of this provision, questions have arisen about the Commission's authority to withhold generic, as opposed to plant specific safeguards information. For example, in its licensing proceeding for the Diablo Canyon nuclear plant, the Commission determined that certain generic information regarding the design basis threat, specifically, that part of the design basis threat relating to the number of armed adversaries against which security plan characteristics were developed, was an integral part of the licensee's security plan. The Commission further determined that release of that information would reasonably be expected to provide substantial assistance in overcoming specific detailed security measures provided in the licensee's security plan for Diablo Canyon, thus significantly increasing the likelihood of unlawful entry and sabotage of that facility. In this situation, the Commission determined that the information, although nominally generic, was properly considered a detailed portion of the applicant's plan and determined that it should be exempt from disclosure.

This section of the bill confirms and clarifies the authority of the agency to withhold this type of information by providing that safeguards information contained in generic studies, reports, and analyses that would provide substantial assistance in compromising or negating any of a licensee's specific security measures or procedures designed to protect nuclear materials or facilities, or in targeting a licensee's vital plant equipment, is exempt from disclosure under FOIA in the same manner as specific information developed by a licensee or applicant under this section of the law.

The Committee notes that the exercise of authority under this section is still subject to the requirement that exemptions from disclosure result in "the minimum restrictions [on access] needed to protect the health and safety of the public . . . [and only] . . . upon a determination that the unauthorized disclosure . . . could reasonably be expected to have a significant adverse effect on the health and safety of the public . . . by significantly increasing the likelihood of theft, diversion, or sabotage" of either nuclear materials or a nuclear facility.

Section 303: Storage and disposal of greater-than-class-C low-level waste

Section 303 requires that any facility for the storage or disposal of greater-than-Class-C waste that is owned or generated under license or regulation by the Nuclear Safety Agency (or an Agreement State) must be licensed by the Agency (or Agreement State). In addition, this section provides that any storage or disposal facility for such waste that is operated by the Federal Government may only be licensed by the Agency (not an Agreement State).

Section 304: Quarterly report on implementation of the Nuclear Waste Policy Act

Section 304 requires the Administrator of the Nuclear Safety Agency to submit to the appropriate Committees of the House of Representatives and the Senate a quarterly report on the status of the Agency's efforts to implement the Nuclear Waste Policy Act of 1982, as amended. Each report shall include, at a minimum, a detailed summary of: (1) the activities of the Agency during the reporting quarter; (2) the funds expended by the Agency during the reporting quarter; (3) all interactions between the Agency and the Department of Energy during the reporting quarter, including Agency communications, recommendations, and other activities regarding the development of a repository pursuant to the Nuclear Waste Policy Act, as amended; and (4) the technical issues that relate to the licensability of any candidate site under consideration for development as a repository and any activities undertaken by the Agency with respect to such issues during the reporting quarter.

Section 305: Regulations for fitness for duty

Section 305 requires the Administrator of the Nuclear Safety Agency, within nine months of the date of enactment of this Act, to promulgate regulations that require licensees holding a license for a production or utilization facility under section 103 and 104 of the Atomic Energy Act of 1954, as amended, to establish a program for the testing of those persons employed by such licensee who are responsible for safety-sensitive functions (as determined by the Administrator) for the use, without lawful authorization, of alcohol or controlled substances.

Subsection (b) of this section requires that any program established by a licensee must include the following testing elements: pre-employment, periodic recurring, random, post incident, and upon the reasonable suspicion that such persons have used, without lawful authorization, alcohol or a controlled substance.

Subsection (c) further requires the Administrator, in establishing regulations for the programs of such licensees, to develop requirements that:

(1) promote, to the maximum extent practicable, individual privacy in the collection of specimen samples;

(2) incorporate scientific and technical guidelines established by the Department of Health and Human Services on February 13, 1987, and any subsequent amendments thereto, with respect to laboratory and testing procedures;

(3) provide for the confirmation of all positive test results by a scientifically recognized method of testing capable of providing quantitative data regarding alcohol or a controlled substance;

(4) require that all laboratories involved in the testing of any individual under this section shall have the capability and facility, at such laboratory, of performing screening and confirmation tests;

(5) ensure that employees are selected for tests by nondiscriminatory and impartial methods so that no employee is harassed by being treated differently from other employees in similar circumstances; and

(6) provide for the confidentiality of test results and medical information of employees (other than information related to the use of alcohol or a controlled substance). This last provision, however, does not preclude the use of test results for the orderly implementation of appropriate sanctions.

Subsection (d) requires each licensee that is required to establish and maintain a program for the testing of its employees pursuant to this section to also establish and maintain a rehabilitation program which, at a minimum, provides for the identification and an opportunity for treatment of employees subject to the provisions of this section and in need of assistance. Each such licensee is encouraged, but not required, to make such a program available to all of its employees. Finally, this subsection should not be read as precluding any licensee from establishing a program under this subsection in cooperation with any other licensee.

Subsection (e) prohibits any State or local government from adopting or putting into effect any law, rule, regulation, ordinance, standard or order that is inconsistent with any regulation promulgated to carry out the provisions of this section. This provision does not apply to provisions of State criminal law which impose sanctions for reckless conduct leading to an actual loss of life, injury or damage to property, whether the provisions apply specifically to employees of a licensee or to the general public.

Subsection (f) provides that if any provision of this section, or the application of such provision to any person or circumstance, is held invalid, the remainder of the section, or the application of such provision to persons or circumstances other than those as to which it was held invalid, shall not be affected thereby.

HEARINGS

The Subcommittee on Nuclear Regulation of the Committee on Environment and Public Works held two days of hearings in the 99th Congress (June 17 and 18, 1986) on legislation to reorganize the Nuclear Regulatory Commission into an agency headed by a single administrator, to create an independent Inspector General, and to create an independent safety board (S. 1235, S. 2471, and S. 2291).

In the 100th Congress, the Committee on Environment and Public Works held two days of hearings on the budget requests of the NRC for fiscal years 1988 and 1989 (February 18, 1987 and March 2, 1988). Also during the 100th Congress, the Subcommittee on Nuclear Regulation of the Committee on Environment and Public Works conducted a hearing on legislation pertaining to the reauthorization of appropriations for the Nuclear Regulatory Commission for fiscal years 1988 and 1989 (S. 1128) on May 6, 1987 (at which time testimony was received relative to issues raised in the appendices of this report); received a statement from Commissioner Roberts during a hearing conducted on May 7, 1987; conducted an additional oversight hearing on June 3, 1987, at which time the Subcommittee received testimony from Commissioner Roberts regarding allegations concerning the release of an NRC document to a licensed utility; conducted two oversight hearings regarding the investigative functions of the Nuclear Regulatory Commission on October 8, 1987; conducted an oversight hearing on the regulatory interface between the Commission and its licensees on October 20, 1987; and held a hearing on legislative proposals to reorganize the NRC on October 29, 1987 (S. 14, S. 100, S. 1769, and S. 1770).

Testimony was received from Members of Congress, Commission members, former Commission members, senior officials, and employees of the Nuclear Regulatory Commission, industry representatives, environmentalists, and inspectors for Commission licensees.

ROLLCALL VOTES

Section 7(b) of rule XXVI of the Standing Rules of the Senate and the rules of the Committee on Environment and Public Works require that any rollcall votes taken during consideration of this bill be announced in this report. All actions on the bill, including the adoption of amendments and the order for the reporting of the bill were taken by unanimous voice vote.

EVALUATION OF REGULATORY IMPACT

In accordance with section 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee make the following evaluation of the regulatory impact of the reported bill:

The bill abolishes the Nuclear Regulatory Commission and establishes as its successor the Nuclear Safety Agency. There is no direct regulatory impact resulting from this action, given that all of the regulatory functions and procedures applying to the Nuclear Regulatory Commission in effect on the date of enactment are transferred to the new agency.

The bill also transfers the functions of the existing Commission's Office of Inspector and Auditor to a newly created independent Inspector General. Again, no direct regulatory impact should result from this action.

The bill creates, within the new agency, an Office of Investigation which has no direct responsibilities for the imposition of regulatory requirements.

The bill also creates within the new agency an independent Nuclear Reactor Safety Investigations Board. This Board, while given the authority to conduct investigations into significant safety events at production or utilization facilities licensed by the Nuclear Safety Agency and to make recommendations to the head of that Agency with respect to regulatory actions necessary to prevent a recurrence of such an event, is not granted any independent regulatory authorities. The regulations that would result from an investigation by the Board arise from the existing statutory mandate of the Nuclear Regulatory Commission, transferred to the new NSA, to adopt reguations as necessary to protect public health and the environment.

The bill provides an authorization for the appropriation of funds to the Nuclear Safety Agency for fiscal years 1988 and 1989; however, this authorization contains no new regulatory directives for the agency.

The bill also contains five miscellaneous provisions, set forth in Title III, that would: extend requirements of existing law for the notification of non-compliance with NRC standards from directors and officers of firms to the firm itself; clarify provisions of existing law regarding the authority of the Commission to withhold from public disclosure certain safeguards information; clarify the licensing authority of the Commission over greater-than-class-C radioactive waste; require a quarterly report from the Nuclear Safety Agency regarding its activities undertaken to implement the Nuclear Waste Policy Act; and require licensees operating production and utilization facilities pursuant to the Atomic Energy Act of 1954, as amended, to establish and maintain a program for the testing of those employees engaged in the performance of safety-sensitive functions for the unauthorized use of alcohol or controlled substances. Except for this last provision, the provisions of Title III should not have significant regulatory impacts as set forth in section 11(b) of Rule XXVI of the Standing Rules of The Senate.

With respect to section 305, which sets forth the requirements for the establishment of a drug testing program for certain employees at civilian nuclear power plants, the Committee notes the following.

Preliminary figures have placed the cost of initial screening and confirmatory tests, as well as the related administrative costs, at between $23 to $100 per employee, depending on the type of test used, the number of drugs tested, and the sensitivity of the test. In addition, testing costs can often be reduced through the joint purchasing power of trade associations or other organizations. Similarly, as testing becomes more widespread, it is possible the cost of testing will be lowered by the new volumes of testing required.

Rehabilitation program costs vary considerably based upon the type, location, and length of the program. Employee assistance program costs associated with the education, counseling and training of employees after rehabilitation are estimated to be $20–30 per employee.

Testing of civilian nuclear power employees in safety-sensitive positions will create an intrusion into the privacy of these individuals, which the Commttee believes is justified, given the overwhelming public interest in the safe operation of nuclear plants, and which is constitutional given the scope of the problem, the safeguards in the legislation and the diminished expectation of privacy of safety-sensitive employees.

With respect to paperwork requirements, the Committee recognizes that compliance with the regulations to be promulgated pursuant to this legislation potentially could be significant assuming that utility licensees will be required to certify to the Administrator that their testing and rehabilitation programs are operative and being properly administered, and that tesing safeguards are being adhered to. However, the Committee expects that the Administrator will seek to minimize additional paperwork requirements wherever possible, through "piggyback" reporting, random auditing, or other appropriate methods.

COST OF LEGISLATION

Section 403 of the Congressional Budget and Impoundment Control Act requires each report to contain a statement of the cost of the reported bill prepared by the Congressional Office. That statement follows:

CONGRESSIONAL BUDGET OFFICE
U.S. CONGRESS
WASHINGTON, D.C. 20515

May 17, 1988

Honorable Quentin N. Burdick
Chairman
Committee on Environment and Public Works
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

The Congressional Budget Office has prepared the attached cost estimate for the Nuclear Regulation Reorganization and Reform Act of 1988.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

James Blum

James L. Blum
Acting Director

cc: Honorable Robert T. Stafford
Ranking Minority Member

CONGRESSIONAL BUDGET OFFICE

COST ESTIMATE

May 17, 1988

1. BILL NUMBER: Not yet assigned.

2. BILL TITLE: Nuclear Regulation Reorganization and Reform Act of 1988

3. BILL STATUS:

As amended and ordered reported by the Senate Committee on Environment and Public Works on March 29, 1988.

4. BILL PURPOSE:

This bill would establish a new Executive Branch agency, the Nuclear Safety Agency (NSA), to assume the functions of the Nuclear Regulatory Commission (NRC) which would be abolished after the NSA is established. The NSA would be headed by a Presidentially-appointed, Senate-confirmed administrator.

Subtitle B of the bill would establish an Inspector General for the NSA, subtitle C would clarify the role of the NSA's Office of Investigations, and subtitle D would establish the independent Nuclear Reactor Safety Investigations Board within the NSA. This board would be charged with investigating significant safety events at nuclear power plants and other investigations requested by the NSA administrator.

Title II would authorize the NSA for fiscal years 1988 and 1989 at $427.8 million and $450 million respectively. In addition, this legislation would:

- make companies responsible for reporting potential safety hazards to the NSA;
- allow the NSA to not disclose information on security plans at power plants;
- clarify the NSA's intention to require a license for a class C radioactive storage facility;
- establish a Nuclear Waste Technical Review Board to consider the application for construction authorization for a high-level nuclear waste facility; and
- establish a program for drug and alcohol testing of nuclear utility employees with safety-sensitive jobs.

5. ESTIMATED COST TO THE FEDERAL GOVERNMENT:

(by fiscal year, in millions of dollars)

	1988	1989	1990	1991	1992	1993
Additional Authorizations	40.5	455.5	5.5	5.5	5.5	5.5
Estimated Outlays	---	341.5	118.0	5.5	5.5	5.5

Costs of this bill fall within budget function 270.

Basis of Estimate:

This bill authorizes $427.8 million for the NSA in 1988, and $5.5 million annually for the Nuclear Reactor Safety Investigations Board over the 1988-1993 period. The NRC's 1988 appropriation is $392.8 million; assuming enactment late in fiscal year 1988, CBO does not expect that any additional outlays would occur as a result of the higher authorization level provided in this bill. Our outlay estimates assume that amounts authorized in this bill for 1989 to 1993 are appropriated, and that spending follows historical patterns.

6. ESTIMATED COST TO STATE AND LOCAL GOVERNMENTS: None.

7. ESTIMATE COMPARISON: None.

8. PREVIOUS CBO ESTIMATE: None.

9. ESTIMATE PREPARED BY: Kim Cawley (226-2860)

10. ESTIMATE APPROVED BY:

for C.G. Nuckols
James L. Blum
Assistant Director
for Budget Analysis

EXECUTIVE COMMUNICATIONS

In addition to the testimony presented by the Nuclear Regulatory Commission at the hearings conducted by the Subcommittee on October 8, 1987, October 20, 1987, and October 29, 1987, the Committee received the following Executive Communications: (1) November 8, 1987 letter from Lando W. Zech, Jr., Nuclear Regulatory Commission, to John B. Breaux; (2) December 8, 1987 letter from Lando W. Zech, Nuclear Regulatory Commission, to John B. Breaux; (3) January 27, 1988 letter from Lando W. Zech, Jr., Nuclear Regulatory Commission, to John Breaux; (4) March 1, 1988 letter from Lando W. Zech, Jr., Nuclear Regulatory Commission, to Quentin N. Burdick; and (5) March 21, 1988 letter from Thomas M. Boyd, Department of Justice, to Quentin N. Burdick. These communications follow:

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

CHAIRMAN

November 9, 1987

The Honorable John B. Breaux, Chairman
Subcommittee on Nuclear Regulation
Committee on Environment and Public Works
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

On October 29, 1987, the Nuclear Regulatory Commission testified before your Subcommittee on various legislative proposals that would significantly restructure the NRC. The majority of the Commission supported enactment of legislation which would restructure the agency so that it is headed by a single administrator. The majority also indicated that as part of a comprehensive legislative package that included the single administrator proposal, the Commission could support legislation that created a nuclear safety board if the board were part of the regulatory agency headed by the single administrator. The majority of the Commission opposed the establishment of a nuclear safety board as an independent federal agency. The Commission did not express views on how the restructured regulatory agency should be organized. In this letter, we set forth our position in greater detail.

The majority of the Commission supports single administrator legislation; however, a restructured agency must have the independence to make the necessary public health and safety judgments. Thus, we believe that the agency should have a limited number of Presidential appointees and not be subject to Office of Management and Budget (OMB) regulatory oversight.

Consistent with these views, the majority of the Commission would oppose single administrator legislation if the agency were made part of another federal agency, or had more than three Presidential appointees (the Administrator, the Deputy Administrator and the Inspector General). It is also imperative that the agency maintain the same relationship with OMB that the NRC now has. OMB would submit our budget to Congress, but would not review proposed agency Congressional testimony or correspondence and would not review draft proposed or final rules. In other words, the agency would continue to carry out its regulatory mission as an independent agency.

The majority of the Commission also would oppose single administrator legislation that would include establishment of a nuclear safety board independent of the agency. Creation of a separate federal agency to investigate nuclear incidents would take away many of the benefits to be gained by creation of a single administrator agency. First of all, responsibility and authority for evaluating incidents at nuclear facilities and making safety recommendations would be diffused. Second, there would inevitably be a duplication of functions as both the nuclear safety board and the nuclear regulatory agency would be required to investigate and evaluate incidents in order to carry out their respective responsibilities. This would likely result in confusion because representatives of both the nuclear regulatory agency and the nuclear safety board would be on site trying to gather identical information following an incident or accident. There is also the potential for conflicting reports to the public on the nature of the accident, undermining the credibility of both agencies and creating confusion. Third, establishment of a nuclear safety board as a separate agency would result in an additional budgetary burden to the federal government because the regulatory agency would still need to maintain its accident investigation and evaluation capabilities to make regulatory decisions. Therefore, we do not believe that creation of a separate nuclear safety board agency would necessarily enhance nuclear safety.

If Congress believes a nuclear safety board is an important component of a restructured nuclear regulatory agency, this objective can be achieved by creating the board as a part of the agency itself. We do not believe this structure would be detrimental to the independence of the board's functions. The Commission currently has an Atomic Safety and Licensing Board and an Atomic Safety and Licensing Appeal Panel which, though they report to the Commission, independently arrive at decisions based on evidence presented to them in NRC adjudicatory proceedings. A safety board could be similarly structured to ensure its independence, while not having some of the management and budgetary disadvantages of creating a wholly separate agency. Moreover, maintaining the safety board within the regulatory agency would ensure close communication and enable the administrator to easily assign additional resources to the board if necessary in a particular case. Thus, a nuclear safety board within the nuclear regulatory agency would be a preferred approach.

We appreciate this opportunity to provide additional views for your consideration on this important matter.

Commissioner Bernthal was on official travel and did not participate in drafting this letter. Commissioner Bernthal's views on the above matters were previously presented to you in his statement before the subcommittee.

Sincerely,

Lando Zech

Lando W. Zech, Jr.

cc: The Honorable Alan K. Simpson

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

CHAIRMAN

December 8, 1987

The Honorable John B. Breaux, Chairman
Subcommittee on Nuclear Regulation
Committee on Environment and Public Works
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

The Nuclear Regulatory Commission expresses its appreciation to the Committee for the opportunity to review the proposed "Nuclear Regulation Reorganization and Reform Act of 1987" prior to Subcommittee markup. The importance of this legislation to the Commission cannot be overemphasized as it would have a profound effect on the nature and quality of nuclear regulation for years to come. As you are aware, the majority of the Commission for several years has conceptually supported legislation, such as S. 1770 introduced by Senator Simpson, which would abolish the Commission and replace it with an agency headed by a single administrator. Although the proposed legislation would create such an agency, it is with much regret that the Commission must inform you that it strongly opposes the proposed legislation.

The Commission in a letter to you dated November 9, 1987 set forth the principles which would guide the Commission in its evaluation of single administrator legislation. In brief, the Commission indicated that the restructured agency must have the independence to make necessary public health and safety judgments. In this vein, we recommended that the agency should have a limited number of Presidential appointees and not be subject to Office of Management and Budget (OMB) regulatory oversight. We also emphasized that we would oppose legislation that included establishment of a nuclear safety board independent of the agency.

We believe the proposed legislation is unsatisfactory in two major respects. First, it is uncertain whether the single administrator would have the necessary independence to adequately carry out the agency's public health and safety mission. Section 103 provides that the Nuclear Safety Agency would be an "independent regulatory agency," but nowhere is this term defined. The relationship between the agency and OMB is therefore not explained. We strongly urge that any legislative proposal make explicitly clear that decisions of the new agency, like current NRC decisions, would not be subject to OMB review and approval. OMB should continue to submit our budget to Congress, but should not review proposed agency Congressional testimony or correspondence and not review draft proposed or final rules.

In addition, we believe that any statute should allow for the appointment of a career civil servant to assist the administrator in the supervision of day-to-day staff activities. Section 105 of the proposed legislation would eliminate the Executive Director for Operations who currently carries out this function.

The Commission vigorously opposes the creation of an Office of Nuclear Reactor Safety Investigations as an independent agency. This arrangement would divide the responsibility and the authority for investigating incidents. Moreover, it would undermine a principal reason for restructuring the NRC under the proposed legislation, namely the need to focus responsibility, authority and accountability. The Commission therefore believes the proposed legislation would weaken, rather then strengthen, nuclear safety regulation.

As we testified before your Subcommittee on October 29, 1987, and repeated in our letter of November 9, 1987, if Congress believes a nuclear safety investigations organization is an important component of a restructured nuclear regulatory agency, this objective cah be achieved by creating such an office as a part of the agency itself. We are confident that this structure would provide the office with the necessary independence.

We appreciate your consideration of these comments. We are prepared to work with the Subcommittee in developing legislation that would satisfy our mutual concerns.

Commissioner Bernthal will supply his views on these and related issues in a separate letter.

Sincerely,

Lando Zech

Lando W. Zech, Jr.

cc: Senator Alan K. Simpson

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

CHAIRMAN

January 27, 1988

The Honorable John B. Breaux, Chairman
Subcommittee on Nuclear Regulation
Committee on Environment and Public Works
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

In a letter dated December 8, 1987, the Nuclear Regulatory Commission provided to you its comments on Title I of the proposed "Nuclear Regulation Reorganization and Reform Act of 1987". In this letter, we set forth our views on the other Titles of the proposed legislation.

Title II contains the sums authorized to be appropriated for Fiscal Year 1989. The numbers should be revised to conform to those that will be contained in the President's Budget which is scheduled to be submitted to Congress in February. We will provide you with the appropriate numbers after the President submits his budget proposal.

Title III contains miscellaneous proposals. Section 304 provides that if DOE receives greater than Class C radioactive waste from those who are licensed by the NRC, it can be disposed of or stored only in NRC licensed facilities. Under current law, DOE storage of such material would not be licensed by the NRC. While we have no objection to licensing the storage of greater than Class C radioactive waste, we have several suggested changes which we urge be adopted. First the proposed legislation needs to be revised to make clear that the licensing requirement applies only to commercial waste received by DOE for storage and does not extend to waste generated by DOE. Second, as currently drafted, the section could be read to give Agreement States the authority to regulate DOE storage or disposal. Agreement States currently do not have authority to regulate the Federal Government as a matter of constitutional law and should not be given such authority. Finally, the licensing provisions related to the greater than Class C radioactive waste require modification. Under the proposal, DOE could not accept greater than Class C waste for storage until it has applied for and received a license from the NRC. This process is likely to take several years. The NRC believes that delay in the receipt of such waste by DOE is more likely to present a potential hazard to the public health and safety than storage of these wastes by DOE in an unlicensed facility. Thus, we believe the preferred approach would be for Congress to specify a date by which DOE is to apply for an NRC license. In the period before a license is issued, DOE would be authorized to store the material on an interim basis.

We have also included minor changes to section 305 relating to NRC reports to Congress on Implementation of the Nuclear Waste Policy Act. We suggest that the report be an annual, rather than a quarterly report. We note in this regard that DOE submits annual reports to Congress on its high-level waste program.

We also request that a section 306 be added to the bill which would modify the requirement that the Advisory Committee on Reactor Safeguards provide an annual report to Congress on the results of its study of the NRC Reactor Safety Research program and budget. The Commission submitted this legislative proposal to Congress on December 2, 1987.

Finally, we ask that a section 307 be added which would preclude the Commission from expending its appropriated funds to reimburse the Federal Emergency Management Agency for that agency's review and evaluation of offsite radiological emergency plans and exercises, unless the NRC consents to such reimbursement. The Conference Committee Report on the recently enacted H.J. Res 395 authorizes FEMA to seek reimbursement from the NRC whenever FEMA's appropriations are inadequate to carry out its offsite radiological emergency plans and exercises. Our budgets have been developed without any contemplation that NRC funds would be given to FEMA. As you are aware, our budget was significantly cut for FY 1988 to the point where we believe it will seriously damage our ability to fulfill our statutory responsibilities. To sustain this cut, we are in the process of making significant reductions to our programs. Under the circumstances, FEMA should not be able to receive reimbursement without our prior consent.

We have appended for your consideration language that incorporates these suggestions. We appreciate your consideration of our views.

Sincerely,

Lando W. Zech, Jr.

Lando W. Zech, Jr.

Enclosure:
Proposed Language

cc: The Honorable Alan K. Simpson

Storage and Disposal of Greater-than-Class-C Low-Level Waste

Section 304. Low-level radioactive waste with concentrations of radionuclides that exceed the limits established by the Agency for Class C radioactive waste, as defined by section 61.55 of title 10, Code of Federal Regulations, as in effect on January 26, 1983, that is owned or generated ~~by-persons-licensed-or-otherwise-regulated-by~~ under license or regulation of the Agency (or an Agreement State) shall not be stored or disposed of except in a facility that is licensed by the Agency (or an Agreement State). Any storage or disposal facility for such waste that is operated by the Federal government shall be licensed only by the Agency. / The Department of Energy shall submit to the Agency an application for storage or disposal of such waste no later than [DATE TO BE SET]. Before Agency licensing, the Department shall accept greater than Class C wastes for storage at Department facilities as necessary, and shall report to the Agency annually on the nature and storage conditions of the wastes received.

~~Quarterly~~Annual Report on Implementation of the Nuclear Waste Policy Act

Section 305. The Administrator shall submit to the Committee on Energy and Commerce and the Committee on Interior and Insular Affairs of the House of Representatives and the Committee on Environment and Public Works of the Senate each ~~quarter~~year a report on the status of the Agency's implementation of the Nuclear Waste Policy Act of 1982 (42 U.S.C. 10101 et seq.). Such report shall include a detailed summary of --

(a) the activities of the Agency during such year;

(b) the funds expended during such year;

(c) all interactions with the Department of Energy with regard to implementation of the Act, including Agency communications, recommendations, and other activities regarding the development of a repository pursuant to Title I of such Act; and

(d) the major technical issues that relate to the licensability of each candidate site under consideration for development as a repository and any activities undertaken by the Agency during such quarter with respect to such issues.

The first such report shall be submitted to the Congress no later than December 3, 1988.

Advisory Committee on Reactor Safeguards Reporting Requirement

Section 306. Section 29 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2039) is amended by replacing the final two sentences of that section with the following sentence:

> In addition to its other duties under this section, the Committee, making use of all available and relevant sources, shall undertake a study of reactor safety research and from time to time, as it deems warranted or as specifically requested by the Congress, prepare and submit to the Congress a report containing the significant results of any such study.

Reimbursement of Federal Emergency Management Agency

Section 307. None of the funds authorized to be appropriated under this Act may be used to reimburse the Federal Emergency Management Agency for that agency's review and evaluation of offsite radiological emergency plans and exercises unless the Commission consents to such payment.

CHAIRMAN

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

March 1, 1988

The Honorable Quentin N. Burdick, Chairman
Committee on Environment and Public Works
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

In October 29, 1987 testimony presented to the Subcommittee on Nuclear Regulation, a majority of the Nuclear Regulatory Commission (NRC) expressed support for legislation which would replace the NRC with an agency headed by a single administrator. Thereafter, the Subcommittee solicited our comments on a specific legislative proposal which would establish a single administrator agency -- the "Nuclear Regulation Reorganization and Reform Act of 1987". On December 8, 1987, the Commission, after reviewing the draft legislation, reiterated its conceptual support for such legislation, but for specified reasons concluded that the draft bill was unacceptable.

Subsequently, the Subcommittee revised its proposal and on February 22 reported a bill out of Subcommittee. While that bill is an improvement over the prior draft, it still contains provisions which are of concern to us. A majority of the Commission could, however, support the bill if the suggestions outlined below are adopted.

First, Section 142 would establish within the Nuclear Safety Agency a three-member Nuclear Reactor Safety Investigations Board. The Chairman of the Board would be nominated by the President and confirmed by the Senate; the other two members would be appointed by the Administrator. Only the President could remove the members. It would seem that, if these three members are to have equal status, they should all be appointed by and removed by the Administrator.

Second, our fundamental concern with the Board, as envisaged in the bill, is that, while the Board should have complete independence during its deliberations, the Administrator should have considerable input into the matters being investigated and their priorities because of his ultimate regulatory responsibilities. In addition, the Administrator should have sufficient supervisory authority over the Board so that its efforts do not unnecessarily duplicate the agency's efforts, and to assure that its reports are presented to the agency in a timely fashion for use in the regulatory process.

We would also suggest that the employees of the Board (and also those employed by the Inspector General) should be in the excepted service, rather than in the competitive service as provided by the Bill. All current NRC employees are in the excepted service, and, therefore, if this legislation is enacted, the restructured agency would be required to have a dual personnel system. This would create an administrative burden and could lead to unequal treatment of employees.

Third, we are also concerned that the legislation should more clearly delineate the relationship between the Nuclear Safety Agency and the Executive Branch. This is important because it is essential that the agency have independence to make the necessary health and safety judgments. This can only be assured if, as is now the case, its non-budgetary actions, in particular its generic regulatory policy determinations, are not subject to the Office of Management and Budget (OMB) review and approval. If the restructured agency is not given this independence from OMB on its non-budgetary actions, this would mean that OMB would have to approve our proposed and final rules and our submissions to Congress, including all testimony and responses to Congressional committees.

Our prime objection to OMB review of proposed and final rules is that this review would not enhance, and could detract from, the proposed Nuclear Safety Agency's ability to carry out its public health and safety mission. The NRC's successor agency would be the only federal agency with the technical expertise to determine what regulatory requirements must be imposed on its licensees to protect the public health and safety. OMB lacks sufficient technical resources in the nuclear safety area to exercise oversight over the development of the agency's technical rules. Considering OMB's lack of technical resources on nuclear safety matters and the potential for additional delays, OMB review would likely lead to unwarranted delays without providing a corresponding benefit in improved rules.

The OMB clearance process is also inconsistent with the principle that the agency must be independent in fact and perception. The proposed legislation offers little benefit if decision-making authority currently spread among five Commissioners would simply be spread among the agency, OMB, and other Executive Branch agencies that participate in the OMB review process.

Furthermore, OMB review of proposed Congressional testimony and correspondence could hinder the Nuclear Safety Agency from communicating fully, frankly, and on a timely basis with Congress on important public health and safety issues. In Congressional testimony, the agency usually presents its views on highly technical policy issues. Therefore, the Nuclear Safety Agency should retain control over the substance of its testimony.

Fourth, our final concern relates to the proposed elimination of the position of Executive Director for Operations. We believe it would be desirable that the statute provide for the appointment of a senior career civil servant to assist the administrator in the supervision of day-to-day staff activities.

We appreciate the Committee's consideration of the Commission's comments on this important matter.

Commissioners Bernthal and Rogers do not concur in this letter.

Sincerely,

Lando W. Zech Jr.

Lando W. Zech, Jr.

cc: Senator Robert T. Stafford

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

Honorable Quentin N. Burdick
Chairman
Committee on Environment and Public Works
Dirksen Senate Office Building, Room 458
Washington, D.C. 20510-6175

Dear Mr. Chairman:

The Department of Justice has reviewed the marked-up version of the "Nuclear Regulation Reorganization and Reform Act of 1988," dated March of 1988. Title I of the bill abolishes the Nuclear Regulatory Commission, and transfers all of its functions to the newly-created Nuclear Safety Agency (the "Agency"). The primary difference between the new Agency and the old Commission is that the Agency is headed by a single Administrator. In our opinion, Subtitle D of Title I of the bill establishing a "Nuclear Reactor Safety Investigations Board" (the "Board"), raises serious constitutional problems. Accordingly, if the bill were presented to the President with the constitutional problems unaddressed, we would recommend disapproval. There is also a conflict between Subtitles C and D of Title I of the bill and a number of practical inadequacies in these provisions.

A. Description of the Bill

Title I of the bill consists of five subtitles. Subtitle A abolishes the Nuclear Regulatory Commission and recreates it as the Nuclear Safety Agency. Section 103(a). All of the Commission's functions are transferred to the Agency, section 103(b), as are the Commission's "personnel employed and the assets, liabilities, contracts, property, records, and other unexpended balances of appropriations," etc. Section 106. The Agency is headed by an Administrator and a Deputy Administrator, both of whom -- like the Commissioners on the Nuclear Regulatory Commission -- are to be appointed by the President, with the advice and consent of the Senate. Section 104.[1]

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[1] By replacing the Commissioners with a single Administrator without fundamentally changing the functions of the agency, this bill would in effect terminate the tenure of those who occupy such executive offices even though the President might wish to retain them. Under certain circumstances, absent a neutral legislative purpose -- the replacement of a commission structure with an agency structure -- provisions such as this one could

Subtitle D establishes within the Nuclear Safety Agency a Nuclear Reactor Safety Investigations Board consisting of three members. Section 141 states that such an independent organization is necessary because there is a potential for conflict of interest in the investigation of safety events arising out of activities regulated by the Nuclear Safety Agency "where the Agency's prior action or inaction may have been a partial contributor to the cause of such event" and in order to "inspire greater public confidence" in the investigation of such events. The Board is said to be an "independent board" within the Nuclear Safety Agency, section 142(a), with members removable by the President for "inefficiency, neglect of duty, or malfeasance in office," section 142(c). Section 143 requires the Nuclear Reactor Safety Investigations Board to investigate "significant safety events" arising out of activities at nuclear production or utilization facilities which may involve possible adverse effects on public health or safety. Subsection (a)(1). After completing an investigation, the Board must submit a written report to the Administrator of the Agency to which the Administrator must respond within 120 days; the Board's report and the Administrator's response are then submitted to Congress and made available to the public. Subsection (a)(3) and (a)(4). "Significant safety event" is defined in subsection (a)(5) of section 143. Subsection (a)(6) provides that prior to the initiation of an investigation the Board shall consult with the Administrator and, if an investigation is warranted, the Board shall set forth in writing its basis for concluding that the event constitutes a significant safety event. These written statements shall be submitted to Congress and made available to the public. Subsection (a)(7) provides that no part of the Board's report shall be admitted as evidence or used in any "suit or action for damages" growing out of the matter investigated. Other subsections of section 143 provide for inspection authority for employees of the Board, obtaining of information from other government agencies, holding of hearings and issuance of subpoenas (with a penalty of up to six months imprisonment and/or a $5000 fine for refusal to cooperate with an investigation), pay and staffing, and the filing of an annual report to Congress by the Board. Other sections in Subtitle D provide for transfer of certain functions to the Board from other elements of the Nuclear Safety Agency and authorization of appropriations.

Subtitle E is a separability provision.

B. Constitutional Objections

As a preliminary matter, we note that as we read the bill the new Agency, unlike the Commission, will not be an independent agency, given that the Administrator is subject to removal by the President for any reason. Our constitutional analysis is predicated on this reading of the bill. We do not address the

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[1] (Cont.) case here.

current format of the Commission; our remarks should be read as addressing only the present bill establishing the Board as a so-called "independent agency" within the structure of an executive department.

1. The limitation on the President's power to remove the Board members imposed by section 142(c)(2) unconstitutionally infringes upon the President's constitutional responsibility to "take Care that the Laws be faithfully executed." U.S. Const., Art. II, sec. 3.[2] The functions of this Board are purely executive. The Board investigates accidents at Agency-licensed facilities, and its decisions relate to changes in executive agency policy and procedures. Its functions involve "[i]nterpreting a law enacted by Congress to implement the legislative mandate," which "plainly entail[s] execution of the law in constitutional terms." Bowsher v. Synar, 106 S. Ct. 3181, 3192 (1986). The Board does not adjudicate cases concerning individual rights or grant or deny claims of individuals. Its functions do not "require absolute freedom from Executive interference," Wiener v. United States, 357 U.S. 349, 353 (1958),[3] nor is the Board a "quasi-legislative or quasi-judicial" agency, such as the one at issue in Humphrey's Executor, 295 U.S. 602, 630 (1935). The bill states that the Board is "an independent board." Given that the Board is performing executive functions, however, its director must be subject to removal by the President or one of his subordinates who serve at his pleasure.

2. The Board is to have three members: a chairman appointed by the President and two other members appointed by the Administrator. Section 142(b). As a constitutional matter, if the Board is to be independent of the Administrator and perform executive functions, the members of the Board would constitute "Officer[s] of the United States" within the meaning of the Appointments Clause of the Constitution, U.S. Const., Art. II, sec. 2, cl. 2.[4] Accordingly, the members of the Board are the

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[2] The language of section 142(c)(2) limiting removal of the Director to "inefficiency, neglect of duty, or malfeasance in office" makes the constitutional problem unavoidable, as the phrase is precisely the same formulation as was used in Humphrey's Executor v. United States, 295 U.S. 602, 619 (1935). It must therefore be assumed that the intent is to make the Office, like the Federal Trade Commission or the Interstate Commerce Commission, a so-called "independent agency."

[3] Unlike the War Claims Commission at issue in Wiener, the Board is not "established as an adjudicating body with all the paraphernalia by which legal questions are put to the test of proof." Id. at 354.

[4] The Appointments Clause of the Constitution provides in full:

> [The President] shall have the Power, by and with the Advice and Consent of the Senate . . . [to] appoint . .

collective Head of a Department and, thus, are principal officers of the United States who, under the Appointments Clause, must be appointed by the President with the advice and consent of the Senate. See 37 Op A.G. 227, 231 (1933). Because the method of appointment of Board members does not comport with this requirement, this bill violates the Appointments Clause and is, thus, unconstitutional. This problem can be cured in one of two ways: the Board members can all be made responsible to the Administrator and authority invested in him to appoint all of the Board members as inferior officers. Alternatively, all of the Board members can be appointed by the President, with the advice and consent of the Senate. As a policy matter, the Administration favors making all of the Board members responsible to the Administrator by providing that he may appoint and remove them.

3. This bill also impermissibly interferes with the President's control over the deliberative processes of the Executive branch by requiring that recommendations of the Board be sent to Congress before the Administrator and the President make decisions relating to the recommendations. Sections 143(a)(4)(B) and 143(a)(6).. Such a requirement of disclosure is designed to reveal opposing views with respect to the decisions at issue. It thus chills the deliberative process and creates public divisions within the executive branch. Accordingly, this requirement offends the President's authority, as head of a unitary executive, to coordinate and supervise the public dissemination of his subordinate's views. See generally Myers v. United States, supra, at 163-64 (1926); Congress Construction Corp. v. United States, 314 F.2d 527, 530-32 (Ct. Cl. 1963).

In addition, we are concerned that requiring executive branch officials to report directly to Congress without mention of the President could possibly be construed to require those officials to report to Congress prior to any opportunity for review or analysis within the executive branch. This Department has consistently maintained that such a reporting requirement raises substantial constitutional concerns, because it intrudes into the President's constitutional prerogatives to control the decision-making process within the executive branch and could possibly impair the confidentiality and usefulness of candid, full discussions within the executive branch.

4. Section 143(j) directs the Board to report to Congress on the substance of the recommendations it has made as to how best to reduce the recurrence of safety events. The Constitution states that the President "shall from time to time. . . recommend to [Congress'] Consideration such Measures as he shall judge

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[4] (Cont.) . all other Officers of the United States, whose Appointments are not herein otherwise provided for, which shall be established by Law: but the Congress may vest the Appointment of such inferior Officers, as they think proper, in the President alone,

necessary and expedient." U.S. Const. Art. II, sec. 3 (emphasis added). This provision of the Constitution gives the President discretion to decide whether and when executive branch officials should propose legislation, and this prerogative cannot be controlled by Congress.

5. Finally, section 202(c) of Title II prohibits the Administrator from reallocating more than $500,000 previously allocated to a specified program or activity without notifying certain congressional committees and waiting thirty days. Section 202 goes on to provide that each such committee may waive that requirement by submitting to the Agency written notification that it does not object to the reallocation before the expiration of the thirty-day period. We have no constitutional objection to the 30-day report-and-wait requirement for the reprogramming of funds. See Alaska Airlines, Inc. v. Brock, 107 S.Ct. 1476, 1483 n.12 (1987); INS v. Chadha, 462 U.S. 919, 935 n.9 (1983); Sibbach v. Wilson & Co., 312 U.S. 1, 15 (1941). However, we believe the provision allowing the committees to waive all or part of the waiting period by approving the proposed reprogrammming device is an unconstitutional legislative veto device, INS v. Chadha, 462 U.S. at 935 n.9.

C. Policy Objections

1. The Office of Investigations in the Nuclear Safety Agency is directed to conduct investigations under various statutes and regulations and to report criminal violations to the Attorney General. At the same time, the Nuclear Reactor Safety Investigations Board is authorized to investigate "significant safety events" arising out of activities licensed or regulated by the agency. The relationship between the Office of Investigations and the Nuclear Reactor Safety Investigations Board is unclear. Indeed, the jurisdictional grant to the Board -- to investigate all events defined as "significant safety events" -- is so broad as apparently to overlap with the jurisdiction of the Office of Investigations to a considerable degree. There is a potential for serious conflict with respect to the investigatory authority of the two offices.

2. Subtitle D requires the Nuclear Reactor Safety Investigations Board to conduct investigations and to file reports thereon, as well as the written statements mandated by subsection (a)(6) of section 143, with the Congress and make them available to the public, and there is no provision for a stay during the pendency of any criminal investigation. Given the breadth of the definition of "significant safety event," which would cover, for instance, the events that occurred at Three Mile Island in Pennsylvania, this reporting requirement has the potential for seriously compromising important criminal

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[4] (Cont.) in the Courts of Law, or in the Heads of Departments.

investigations being conducted by the Department of Justice with the assistance of the Nuclear Safety Agency's Office of Investigations. The legislation should provide a mechanism for obtaining a stay in appropriate cases, at least where there is no immediate threat to public health or safety.

These two objections would be substantially ameliorated by clarifying that the Board has no authority to conduct criminal investigations and that such authority rests only in the Office.

3. Subsection (a)(7) of section 143 provides that no part of the investigation of a significant safety event by the Nuclear Reactor Safety Investigations Board may be used in any "suit or action for damages" arising out of any matter investigated by the Board. Investigations by the Board may very well uncover criminal violations, and it is not at all clear that the language of subsection (a)(6) limits its application to civil cases. The subsection should clearly state that information uncovered in an investigation may be used in connection with criminal prosecutions.

4. Subsection (d) of section 143 provides for the holding of hearings and issuance of subpoenas by the Nuclear Reactor Safety Investigations Board and provides that any person who refuses to comply with a subpoena shall be fined not more than $5000 nor imprisoned for not more than six months or both. The bill should also contain a provision for civil contempt authorizing the incarceration of a recalcitrant witness until the witness cooperates.

5. While subsection (c) of section 205A appears to give the Office of Investigations created by Subtitle C some independent authority to initiate investigations, subsection (b) states that the Office shall perform such functions "as the Administrator shall designate." Thus the degree of independence possessed by the Office of Investigations is unclear. In our view, the Office of Investigations must have clearly stated and unambiguous independent authority to initiate such civil or criminal investigations as it deems appropriate. This would make more meaningful the authority of the Office of Investigations set forth in proposed section 205A(e) to refer criminal cases to the Attorney General without the concurrence of the Administrator.

6. Finally, the Department objects to subsection (b) of section 131 of Subtitle C, which requires the Attorney General and the Administrator[5] of the Nuclear Safety Agency to enter into a memorandum of understanding with respect to criminal referrals within 90 days from the date of enactment of this legislation. The desirability and feasibility of formal agreements or understandings between agencies should be matters within the

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[5] The bill refers to "the Commission." We assume this means the Administrator.

discretion of the executive branch and not the subject of legislation. Moreover, the specifics of this provision are troublesome. Ninety days may be an insufficient period of time within which to draw up a memorandum of understanding. For example, the Department is currently negotiating a memorandum of understanding with the Nuclear Regulatory Commission. While agreement has been reached on many issues, there are still some matters to be resolved, and the process has taken considerably longer than 90 days. In addition, subsection (b) provides that such a memorandum of understanding shall provide "decision procedures and schedules" with respect to criminal matters referred to the Attorney General. What is intended by this vague language is certainly unclear. In any event, forcing criminal investigations to adhere to rigid timetables or schedules is inappropriate in many cases. Subsection (b) should be deleted in its entirety.

The Office of Management and Budget has informed us that it has no objection to the submission of this report, and that the proposed legislation would not be in accord with the program of the President. The Department is continuing to study this bill and we may be providing further comments about it in the near future.

Sincerely,

Th Boyd

Thomas M. Boyd
Acting Assistant Attorney General

ANALYSES BY THE CONGRESSIONAL RESEARCH SERVICE

Following receipt of the views of the Department of Justice, the Congressional Research Service prepared two analyses of the constitutionality of various provisions in the legislation. The CRS analyses follow:

Congressional Research Service
The Library of Congress

Washington, D.C. 20540

March 29, 1988

TO : Senate Subcommittee on Nuclear Regulation, Committee on Environment and Public Works
Attention: Dan Berkovitz

FROM : American Law Division

SUBJECT : Response to Justice Department Comments On the Proposed Nuclear Regulation Reorganization and Reform Act of 1988

The proposed Nuclear Regulation Reorganization and Reform Act of 1988 would abolish the five-member Nuclear Regulatory Commission and transfer its functions to the Nuclear Safety Agency which would be headed by a single Administrator who would be appointed by the President with the advice and consent of the Senate and would be removable by him at will. The bill would also create a Nuclear Reactor Safety Investigations Board (Board) consisting of three members. One member is to be appointed by the President, and two by the Administrator. The members are removable by the President only for "inefficiency, neglect of duty, or malfeasance in office." The Board is responsible for investigating "significant nuclear events" and assessing the implications of such events for the public health and safety and reporting its findings and any recommendations for action to the Administrator who must respond in writing to the Congress within 120 days. The response is made public at that time. The Board cannot undertake an investigation on its own without prior consultation with the Administrator and a written determination that the event is significant. Its recommendations are not binding on the Administrator. However, if the Administrator adopts the recommendations, he is obligated to undertake specified actions within certain time periods.

In a letter to the Chairman dated March 21, 1988, the Department of Justice raised five constitutional objections to the bill. You have asked that we comment critically on these objections in time for a Committee mark up scheduled for 2:00 PM, March 29. In view of the time constraints imposed, the following comments are necessarily brief and summary in nature.

1. Restrictions on Removability.

DOJ objects to the restriction on presidential removability of Board members except for stated cause on the grounds that the Board members are performing "purely executive" functions and the removal limitation improperly interferes with his duty to "take care that the laws are faithfully executed." DOJ particularly relies on Bowsher v. Synar, 106 S. Ct. 3181, 3192 (1986) to the effect that the Board's "functions involve '[i]nterpreting a law enacted by Congress to implement the legislative mandate,' which 'plainly entail[s] execution of the law in constitutional terms'." As a consequence, it is urged, Board members must be subject to unfettered removal by the President or one of his subordinates who serve at his pleasure.

The DOJ appears to misapprehend the nature of the Board's functions under the bill and the Bowsher Court's delineation of what constitutes "executive action". Simply put, the Board's statutory role would be recommendatory; its suggestions may be accepted or rejected by the Administrator in their entirety. The fact that the Board would have to interpret the law in order to formulate its recommendation does not transform that function into "execution of the law in constitutional terms." A governmental action is "executive" because of the nature of its effect, not because it is in obedience to the command of law. This distinction was made clear recently in Ameron v. U.S. Corps of Engineers, 809 F.2d 979 (3d Cir. 1986), cert. granted, 56 U.S.L.W. ___ (S. Ct. 3/21/88), a case raising Bowsher questions with respect to the Comptroller General's authority under the Competition in Contracting Act, 31 U.S.C. 3551-3556 (Suppl. III 1985). Under that Act the Comptroller General is empowered to shorten or lengthen the statutorily prescribed period of stay of a procurement award if he determines that a bid protest is frivolous or that he needs more time to formulate a recommendation on the merits. The Government argued that because in discharging this function the Comptroller General "interprets the provisions of the Act" and "must exercise judgment concerning the facts that affect the application of the Act" he is executing the law within the meaning of Bowsher.

The appeals court disagreed, noting that the Government's formulation of the Bowsher test was incomplete. It pointed out that while Bowsher stated that interpretation of law is an essential part of execution of the law, the Court held that it was only an indicia of such execution. "The mere fact that a nonexecutive official interprets the law, however, does not in and of itself mean that this official infringes on the President's authority to execute the law. Synar's discussion of the 'executive nature' of the Comptroller General's authority in that case did not end with the sentences quoted by the Army, but rather focused on the Comptroller's authority under Gramm-Rudman-Hollings to direct the exercise of Presidential authority: [quoting section 252(a)(3)]." 809 F.2d at 990 (emphasis supplied).

Since the Board is an advisory body that performs no functions that could not be assigned to a committee of the Congress, see Buckley v. Valeo, 424 U.S. 1, 137-138 (1926), the members of the Board are not officers of the United States subject to requirements of at will removal prescribed by Myers v. United States, 272 U.S. 52, 122 (1926).

2. Improper Appointments.

DOJ similarly argues that the method of appointment of the Board members violates Article II, sec. 2, cl. 2 of the Constitution, the Appointments Clause. Again, however, if the Board is an advisory body, its members are not officers of the United States subject to appointments pursuant to the alternative methods prescribed by the Appointments Clause.

3. Impermissible Interferences with Deliberative Processes of Executive Branch.

DOJ contends that the bill's requirement that the Board's recommendations be transmitted to Congress before the Administrator or the President make any decisions with respect to those recommendations impermissibly interferes with the President's control of the deliberative processes of the Executive Branch in that it undermines the President's authority, "as head of a unitary executive, to coordinate and supervise the public dissemination of his subordinates views," citing Myers v. United States, supra. Executive branch officials, it is argued, cannot be required to report to Congress prior to any opportunity for presidential review or analysis because it would "intrude [ ] into the President's constitutional prerogative to control the decisionmaking process within the executive branch." Since the President is in no way restricted by the bill in his ability to communicate with the Administrator with respect to the response to the Board's recommendations and to influence her in the areas in which Congress has left her with discretionary leeway, DOJ appears to be taking the position that the President must have control over the discretionary decisionmaking processes of both the Administrator and the Board. Even assuming the Board to be composed of officers of the United States performing substantive functions, the contention appears to lack substantial support in law.

DOJ's assertion rests on a view of the executive branch as a highly centralized bureaucratic structure. This model of governance envisions a unified and hierarchical executive with the President at the apex and all administrative agencies arrayed below him. It views the President, in his role as the only nationally elected official of the federal government, as the possessor of broad supervisory and managerial powers as well as an encompassing political presence in administrative agencies. The Chief Executive's constitutional duty to see that the laws are faithfully executed under article II, section 2 is seen as providing both the responsibility and the authority to intervene in administrative decisions in order to set priorities, allocate limited resources, balance competing policy goals, resolve conflicting jurisdictions and responsibilities of agencies, and assure that programs are effectively and efficiently managed.

On the other hand, Congress bases its ability to direct the President and other subordinate executive branch officials in the manner prescribed in the bill on its view that the executive power is not hierarchical in nature or uniquely vested in the President alone, just as the President's functions are not solely executive (e.g., the veto power). Article II clearly anticipates the creation of an administrative bureaucracy by its mention of "Heads of Departments," and the necessary and proper clause of article I makes it clear that it would be Congress alone that would do the creating. Congress can assign a "Head of Department" any executive power not textually reserved to the President in Article II. Moreover, the "take care" clause has not been read by the courts to vest absolute power in the President over Heads of Departments and other subordinate officials. That clause says only that the President "shall take care that the laws be faithfully executed," regardless of who executes them, a duty quite different from the claim of a single-handed responsibility for executing all laws. A literal reading of the "take care" clause confirms the President's duty to ensure that officials obey Congress' instructions; it does not create a presidential power so great that it can be used to frustrate congressional intention. In the words of the Supreme Court, where a valid duty is imposed upon an executive official by Congress, "the duty and responsibility grow out of and are subject to the control of the law, and not the direction of the President." Kendall ex rel Stokes v. United States, 37 U.S. (12 Pet.) 524, 610 (1838). In the past, similar claims of broad substantive authority deriving from the "take care" clause have been consistently rejected by the courts. See, e.g., Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952); In re Theodore Olson, 818 F.2d 34 (D.C. Cir. 1987); National Treasury Employees Union v. Nixon, 492 F.2d 587, 604 (D.C. Cir. 1974); Guadamuz v. Ash, 386 F. Supp. 1233, 1247 (D.D.C. 1973).

Moreover, the history of federal administrative practice, and relevant judicial precedent, accord Congress virtually plenary power over the creation of the structure of the administrative bureaucracy and the powers of the offices and officers who are to carry out the legislative will. To summarize the current state of the law, Congress may by statute create so-called independent regulatory commissions headed by officials appointed by the President but not removable by him except for cause, Humphrey's Executor v. FTC, 295 U.S. 602 (1935); Weiner v. U.S., 357 U.S. 349 (1958); it may create offices within executive departments whose incumbents are appointed by the department heads but who are subject to removal only by the appointing official and not the President, U.S. v. Nixon, 418 U.S. 683 (1974); U.S. v. Perkins 116 U.S. 483 (1886); and it may vest in a subordinate official appointed by the

President (who is subject to his removal at will) discretionary decisionmaking authority which cannot be interfered with by him, *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 166 (1803); *U.S. ex rel Kendall* v. *Stokes*, *supra*; *Public Citizen* v. *Burke*, 655 F. Supp. 318 (D.D.C. 1987); *Gilchrist* v. *Collector of Customs*, 10 F. Cases 355, 356, 363 (C.C.D.S.C. 1808)(No. 5, 420).

Moreover, Congress' power to influence executive and other governmental conduct is not confined to its utilization of its lawmaking authority. The courts have long recognized congressional authority to investigate, and to publish its opinion, in an attempt to influence the manner in which the laws are executed. *McGrain* v. *Daugherty*, 273 U.S. 135 (1927); *Watkins* v. *United States*, 354 U.S. 178 (1957). In upholding the exercises of similar kinds of authority, courts have acknowledged that the issuance of a subpoena to the executive, *United States* v. *Nixon*, 418 U.S. 683 (1974), the mandate of a report and wait provision, *INS* v. *Chadha*, 462 U.S. 919, 935 n. 9, *citing* *Sibbach* v. *Wilson & Co*., 312 U.S. 1 (1941), the expression of disapprobation or the focusing of public attention on executive action, *Bowsher* v. *Merck & Co*., 460 U.S. 824, 833 (1983); *City of Alexandria* v. *United States*, 737 F.2d 1022 (Fed. Cir. 1984), do not themselves constitute control of executive decisionmaking. See also, *Ameron* v. *U.S. Corps of Engineers*, *supra*, 809 F.2d at 992-993, 995.

The D.C. Circuit's recent decision in *In re Sealed Case*, ___ F.2d ___ (D.C. Cir. 1988), *cert. granted sub nom*, *Morrison* v. *Olson*, could raise some doubts as to these conclusions. The court in that case declared the statute establishing the Independent Counsel unconstitutional. Although the principal ground stated for the decision rested on its interpretation of the Appointments Clause, *i.e.*, criminal prosecutors must be appointed by either the President with the advice and consent of the Senate (because they are "superior"

Officers) or by heads of departments but not by the courts, the court also propounded as an alternative ground of decision the notion of a unitary executive essentially as described above. The Supreme Court's ultimate disposition of the case, which will be argued on April 26, 1988, must be watched for its illumination on this issue. It may be said, however, that the appeals court's application of the unitary executive theory is novel.

4. Constitutionality of Board's Reporting Requirement.

DOJ contends that the bill's requirement that the Board report directly to Congress on the substances of the recommendations it has made as to how best to reduce the recurrence of nuclear safety events violates Article II, sec. 3 of the Constitution which states that the President "shall from time to time... recommend to [Congress'] consideration such measures as he shall judge necessary and expedient". It is urged that this provision "gives the President discretion to decide whether and when executive branch officials should propose legislation, and this prerogative cannot be controlled by Congress."

It would not appear that the President's recommendatory duty under this constitutional provision is in any way circumscribed by the proposed bill. A presidential alternative to any Board recommendation, including abandonment of the proposed course of action, is not precluded. More importantly, the Article II duty to recommend, as with the duty to take care that the laws be faithfully executed which appears in the same clause, is not a source of substantive presidential power and claims to that effect have been consistently rejected by the courts. See, *e.g.*, *Kendall ex rel Stokes* v. *United States*, 37 U.S. (12 Pet.) 522, 612-13 (1838) ("To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid execution, is a novel construction of the Constitution, and entirely inadmissable."); Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952) (" ...[T]he President's power to see that the laws are faithfully executed refutes the idea he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad."); National Treasury Employees Union v. Nixon, 492 F.2d 587, 604 (D.C. Cir. 1974) ("That constitutional duty does not permit the President to refrain from executing laws duly enacted by the Congress as those laws are construed by the judiciary.").

5. Constitutionality of Committee Waiver of 30 Day Wait Period.

Under section 202 of the bill the Administrator is required to report to certain congressional committees if she wishes to reprogram more than $500,000 specifically allocated to a program or activity and to wait 30 days before taking such action. The committees may reduce the waiting period by notifying the Administrator that they have no objections prior to the expiration of the 30 days. DOJ contends that such a waiver is proscribed by INS v. Chadha, 462 U.S. 919 (1983).

The Chadha opinion did not specifically address this question although it approved the use of report and wait provisions. 462 U.S. at 935 n. 9. The issue was directly confronted and disposed of in light of Chadha in Ameron, Inc. v. U.S. Corps of Engineers, 809 F.2d 979 (3rd Cir. 1986), cert. granted, 56 U.S.L.W. ___ (S. Ct. 3/21/88). There the Government challenged the validity of a provision of the Competition in Contracting Act (CICA), 31 U.S.C. 3551-3556 (Suppl. III 1985), which allows the Comptroller General to shorten the automatic 90 day stay period for his consideration of bid protests if the protestor's claim is deemed frivolous or the investigation is complete, and to lengthen the stay period if more time is necessary to complete the investigation. It was argued that such action by a legislative branch official is proscribed by Chadha in that the authority of the Comptroller "to extend or shorten the stay usurps executive power per se, on the one hand, and on the other hand that it authorizes the Comptroller General to interfere impermissibly in the executive's performance of its responsibilities." 809 F.2d at 989. Utilizing the standard for testing separation of powers claims propounded in Nixon v. GSA, 433 U.S. 425 (1977) and U.S. v. Nixon, 418 U.S. 683 (1974), the appeals court concluded that the Comptroller's authority to lengthen or shorten the stay period neither prevented the Executive Branch from accomplishing its constitutionally assigned function nor presented a potential for disruption that was not justified by an overriding need to promote objectives within the constitutional authority of Congress. The court reasoned as follows:

> Even if we were to consider this impact on executive decision making to be a potential disruption of the "proper balance of power," Nixon v. GSA, 433 U.S. at 443, 97 S. Ct. at 2790, we believe that a balancing of legislative and executive interests demonstrates that this interference is entirely justified. In United States v. Nixon the Supreme Court noted that the disclosure of the President's private papers and conversations might indeed interfere with the President's execution of the law. But the Court deemed this interference justified by the need for such documents in a simple criminal trial, the greater political significance of which played no part in the Court's analysis. In contrast to the intrusion in that case, the intrusion occasioned here by the Comptroller General's discretion to lengthen or shorten the stay is far more limited, and we are certain that the legislative interests underlying CICA prevail. Indeed, for three reasons, we believe that any potential disruption of the executive function is minimal:
>
> 1. The initial stay is short. Even if the acquiring agency were to change a procurement decision in order to avoid or to cut short a bid protest, it would not stand to gain so much time that the temptation to do so would have a significant impact on the agency's purchase decision.

> 2. CICA does not authorize the Comptroller General to extend the stay any longer than necessary to decide a bid protest. We cannot envision circumstances, and none have been suggested to us, when this time could be long enough to constitute a significant impediment to the President's execution of the procurement laws.
>
> 3. If the Comptroller General really does require so much time to decide the protest that the stay interferes with important executive interests, CICA authorizes the executive to override the stay. In light of these factors, we simply do not believe that the executive has shown that CICA creates any significant impediment to the President's execution of the law. In fact, we are persuaded that "any intrusion" permitted by CICA upon the executive branch "can only be termed de minimis." *Commodity Futures Trading Comm'n* v. *Schor*, ___ U.S. ___, 106 S. Ct. 3245, 3260, 92 L. Ed. 2d 675 (1986).

809 F.2d at 997 (footnotes omitted)

Arguably, the disruptive effect of an exercise of the waiver authority accorded committees under the proposed bill pales in comparison to that involved in the *Nixon* cases and *Ameron*. In fact, it may be contended that the waiver facilitates effective and efficient administration of the law that far outweighs the minimal intrusion on the executive that may be perceived.

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May 19, 1988

TO : Senate Subcommittee on Nuclear Regulation, Committee on Environment and Public Works
Attention: Dan Berkowitz

FROM : American Law Division

SUBJECT : Further Comments on the Proposed Nuclear Reorganization and Reform Act of 1988

As a follow up to our memorandum of March 29, 1988, you inquire as to the basis of Congress' authority (1) to vest investigatory authority in the proposed Nuclear Reactor Safety Board (Board) and (2) to require the Administrator of the new Nuclear Safety Agency to provide Congress with copies of all "budget estimates, requests, and information (including personnel needs), legislative recommendations, prepared testimony for congressional hearings, and comments on legislation at the same time they are sent to the President or the office of Management and Budget."

1. Investigatory Authority. As we indicated in our March 29 memo, the Nuclear Reactor Safety Investigation Board would be an advisory body and thus its members need not be appointed in the manner prescribed by Article II, section 2, cl. 2 of the Constitution. Buckley v. Valeo, 424 U.S. 1, 137-138 (1976). However, the Buckley Court made it quite clear that while such appointees could not exercise "significant authority pursuant to the laws of the United States" such as conducting civil litigation, promulgating substantive rules or determining eligibility for Federal funds, Congress could lawfully vest them with powers to investigate and to gather and disseminate information, and the ability to enforce such tasks, since they are functions

that could be delegated to its own committees as aids in performing its legislative function. The Court stated:

> Insofar as the powers confided in the Commission are essentially of an investigative and informative nature, falling in the same general category as those powers which Congress might delegate to one of its own committees, there can be no question that the Commission as presently constituted may exercise them. Kilbourn v. Thompson, 103 U.S. 168 (1881); McGrain v. Daugherty, 273 U.S. 135 (1927); Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975). As this Court stated in McGrain, supra, at 175:
>
> > "A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information--which not infrequently is true--recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed. All this was true before and when the Constitution was framed and adopted. In that period the power of inquiry--with enforcing process--was regarded and employed as a necessary and appropriate attribute of the power to legislate--indeed, was treated as inhering in it."
>
> 424 U.S. at 137-138.

2. Concurrent Submissions. Statutory requirements that executive branch officials report directly to the Congress trace their roots to the very first Congress. The legislation establishing the Treasury Department required the Secretary to report to Congress "and generally perform all such services relative to the finances, as he shall be directed to perform." Act of September 2, 1789, ch. 12, sec. 2, 1 Stat. 65, 66. Pursuant to this mandate, Alexander Hamilton, the first secretary of the Treasury, submitted seminal reports to the Congress at the direction of the House of Representatives. Each report begins

with an acknowledgement of the order of the House which had directed him to report. See, *e.g.*, Report of Public Credit, 2 Annals of Congress 1991 (1790); Report on a National Bank, *id.*, 2031; Report on Manufactures, 3 Annals of Congress 971 (1791) ("The Secretary of the Treasury, in obedience to the order of the House of Representatives ..."). Prior to the passage of the Budget and Accounting Act of 1921, 42 Stat. 20, which established the President's authority over the agency budget process, each agency had submitted its annual budget request directly to Congress. Finding this process inefficient and unwieldy, Congress created the Bureau of the Budget (now the Office of Management and Budget) to review the morass of agency budgetary information and to approve agency budget requests. See generally, L. Fisher, Presidential Spending Power, ch. 1 (1975). In addition to authority to review and approve agency budget requests, the Bureau was subsequently authorized to clear proposals for legislation or agency comments on proposed legislation, *see* Reorganization Act of 1939, ch. 36, tit. II, 53 Stat. 565 (codified at 31 U.S.C. 1108 (1982)).

Congress' voluntary relinquishment of this authority has not been unequivocal. Either House may request an agency official to submit directly to it "an appropriation estimate or request, a request for an increase in that estimate or request, or a recommendation on meeting the financial needs of the Government." 31 U.S.C. 1108(g)(1982). Also, Congress has selectively required simultaneous or unaltered submission of budget requests and legislative proposals and comments. Thus, since 1973, Congress has mandated that the budget requests of the U.S. Postal Service, *see* Act of June 30, 1974, Pub. L. No. 93-328, § 23, 88 Stat. 287 (codified at 39 U.S.C. § 2009 (1982)), and the U.S. International Trade Commission, *see* Trade Act of 1974, Pub. L. No. 93-618,

§ 175(a)(1), 88 Stat. 1978 (1975) (codified at 19 U.S.C. § 2232 (1976)), be submitted to Congress without revision, and that the budget requests and legislative proposals of other agencies be submitted concurrently to OMB. See, e.g., Privacy Act of 1974, Pub. L. No. 93-579, § 5(a)(5), 88 Stat. 1896 (reprinted in 5 U.S.C. § 522a app., at 318 (1976))(Privacy Protection Study Commission); Commodity Future Trading Commission Act of 1974, Pub. L. No. 93-463, § 101(a)(3), 88 Stat. 1389 (1974) (codified at 7 U.S.C. § 4a(h)(1)-(2)(1982)) (Commodity Future Trading Commission); Consumer Product Safety Act, Pub. L. No. 92-573, § 27(k), 86 Stat. 1207 (1972) (codified at 15 U.S.C. § 2076(k)(1982) (Consumer Product Safety Commission); Hazardous Materials Transportation Act, Pub. L. No. 93-633, § 304(b)(7), 88 Stat. 2156 (1975) (codified at 49 U.S.C. § 1903(b)(7)(1982)) (National Transportation Safety Board); Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 202(a), 92 Stat. 1122 (codified at 5 U.S.C. § 1205(j)(1982) (Merit Systems Protections Board); Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, § 311, 90 Stat. 60 (codified at 31 U.S.C. § 1108(f)(1976)) (Interstate Commerce Commission); Department of Energy Act, Pub. L. No. 95-91, § 401, 91 Stat. 582 (codified at 42 U.S.C. § 717(j)(1982))(Federal Energy Regulatory Commission); AMTRAK Improvement Act of 1973, Pub. L. No. 93-146, § 12, 87 Stat. 553 (codified at 45 U.S.C. § 601(d)(1976) (National Railroad Passenger Corporation); Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, § 2021, 87 Stat 990 (codified at 45 U.S.C. § 712(f)(1982)) (U.S. Railway Association). Also, section 111 of the Act of Oct. 28, 1974, exempts the following agencies from clearance of legislative proposals and comments: Securities and Exchange Commission, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Federal Home Loan Bank Board, and the National Credit Union Administration. Act of Oct. 28, 1974, Pub. L. No. 93-495, § 111, 88 Stat. 1500 (codified at 12 U.S.C. § 250 (1982)).

The Supreme Court has long recognized the validity of direct reporting requirements. See, e.g., INS v. Chadha, 462 U.S. 919, 935 n. 9 (1987); Sibbach v. Wilson and Co., 312 U.S. 1 (1941). At the core of this aspect of congressional authority is the recognition of the legislature's need for reliable information in order to fulfill its constitutionally mandated functions. As a general proposition it may be posited that, in the absence of a countervailing constitutional privilege or a self-imposed statutory restriction upon its authority, the Congress (and its committees) has plenary power to compel information needed to discharge its legislative function from executive agencies, private persons, and organizations, and, within certain constraints, the information so obtained may be made public. The fact that the Executive has determined for its own internal purposes that a particular item should not generally be disclosed does not prevent either House of Congress, or its committees and subcommittees, from obtaining and publishing information that it considers essential for the proper performance of its functions. The case law delineating Congress' expansive oversight authority demonstrates its virtually plenary power in this area.

Thus, although there is no express provision of the Constitution which specifically authorizes the Congress to conduct investigations and take testimony for the purpose of performing its legitimate functions, the practice of the British Parliament and numerous decisions of the Supreme Court of the United States have firmly established that the investigatory power of Congress is so essential to the legislative function as to be implied from the general vesting of legislative power in Congress. McCrain v. Daugherty, 273 U.S. 135

(1927); Watkins v. United States, 354 U.S. 178 (1957); Barenblatt v. United States, 360 U.S. 109 (1959); Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975); Nixon v. Administrator of General Services, 433 U.S. 425 (1977); see also, United States v. A.T.T., 551 F.2d 384 (D.C. Cir. 1976) and 567 F.2d 1212 (D.C. Dir. 1977). Chief Justice Warren speaking for the Court in Watkins described the power as follows:

> We start with several basic premises on which there is general agreement. The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possible needed statutes. It includes surveys of defects in our social, economic, or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste. But broad as is this power of inquiry, it is not unlimited. There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress . . . Nor is the Congress a law enforcement or trial agency. These are functions of the executive and judicial departments of government. No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress. 354 U.S. at 187.

Legitimate legislative tasks encompassing the power have been defined as activities that are "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." Gravel v. United States, 408 U.S. 606, 625 (1973).

In the Eastland case the Court reiterated its view that the power of effective congressional inquiry is an integral part of the legislative process:

> The power to investigate and to do so through compulsory process plainly falls within ... [the Gravel definition of legitimate legislative tasks]. This Court has often noted that the power to investigate is inherent in the power to make laws because '[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change.' McGrain v. Daugherty, 273 U.S. 125 175 (1927) ... Issuance of subpoenas such as the one in question here has long been held to be a legitimate use by Congress of its power to investigate ...

> "[W]here the legislative body does not itself possess the requisite information--which not infrequently is true--recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete, as some means of compulsion are essential to obtain what is needed." McGrain v. Daugherty.

These broad principles of Congressional investigatory authority apply a fortiori to the exercise of Congress' Article I power to create the agencies and offices necessary to carry out its policy directives. Buckley v. Valeo, supra, at 138. Anticipation of a legislative need to know accurately what an agency official actually thinks with respect to his agency's budget or about changes in his agency's legislative authority, as reflected in an identifiable document, would appear well within the congressional prerogative. As we indicated in our March 29 memo, pp. 5-6, 8-9, reporting provisions such as the one in question in no way significantly circumscribe the President's duties to "take care" that the laws be faithfully executed or to "recommend to [Congress'] consideration such measures as he shall judge necessary and expedient," under Article II, section 3. As was noted there, these clauses are not a source of substantive presidential power and claims to that effect have been consistently rejected by the courts, most recently by the Court of Appeals for the Ninth Circuit in *Lear Siegler, Inc. v. Lehman*, 842 F.2d 1102 (9th Cir. 1988) ("To construe this duty to faithfully execute the laws as implying the power to forbid their execution perverts the clear language of the 'take care' clause."). Nor may such requirements be reasonably seen as aggrandizing congressional power in derogation of presidential power. The Chief Executive maintains his ability to communicate with the Administrator with respect to budget matters and proposed legislation and to influence her ultimate views. Further, she serves at his pleasure. The ability to remove her at will has recently been recognized by the Supreme Court as the ultimate power over an official: "[I]t is only the authority that can remove him, and not the authority that appointed him that he must fear, and, in the performance of his functions, obey." *Bowsher v. Synar*, 106 S.Ct. 3181, 3188 (1986) (quoting *Synar v. U.S.*, 626 F. Supp. 1374, 1401 (D.D.C. 1986) (3-judge court). Moreover, the President's recommendatory duty under Article III is not circumscribed in any way by such a provision. A presidential alternative, including the abandonment of a proposed course of action, is not precluded. Thus any intrusion on the ability of the President to exercise his core executive functions is likely to be deemed *de minimis*. *Commodity Futures Trading Commission v. Schor*, 106 S.Ct. 3245, 3260 (1986); *Ameron v. U.S. Corps of Engineers*, 809 F.2d 979, 997 (3d Cir 1986), *cert granted*, 56 U.S.L.W. 3638 (S.Ct. 3/21/88). Finally, no case has expanded the concept of executive privilege recognized in *U.S. v. Nixon*, 418 U.S. 683 (1974), to cloak the kind of communications implicated by the type of reporting provisions involved here.

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Changes in Existing Law

In compliance with section 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill as reported are shown as follows: Existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman.

THE ATOMIC ENERGY ACT OF 1954

AN ACT For the development and control of atomic energy.

* * * * * * *

Sec. 191. Atomic Safety and Licensing Board.—

* * * * * * *

(c) Procedures for Consideration of Application for a Construction Authorization.—(1) Upon the receipt of an application for a construction authorization pursuant to 42 U.S.C. 10134(b), the Administrator shall establish a licensing board for the consideration of such application. The board shall be comprised of three members, one of whom shall be qualified in the conduct of administrative proceedings and two of whom shall be appointed from among persons nominated by the Nuclear Waste Technical Review Board in accordance with paragraph (2). Members of the Board shall be appointed for such length of time as may be necessary to consider and act upon such application.

(2) The Nuclear Waste Technical Review Board shall, not later than 60 days after the date on which the recommendation of site designation becomes effective under 42 U.S.C. 10135, nominate not less than 6 persons for appointment to the licensing board pursuant to paragraph (1). Each person nominated for appointment to the Board shall have such technical or other qualifications as the Nuclear Waste Technical Review Board deems appropriate to the issues to be decided in consideration of an application for a construction authorization

(3) Upon the issuance of a final decision by the licensing board on an application for a construction authorization, the Administrator may either affirm the decision or remand the decision to the licensing board for further action consistent with such order or remand if such decision is unsupported by substantial evidence on the record.

Inspector General Act of 1978

* * * * * * *

PURPOSE; ESTABLISHMENT

Sec. 2. In order to create independent and objective units—

(1) to conduct and supervise audits and investigations relating to programs and operations of the Department of Agriculture, the Department of Commerce, the Department of Defense, the Department of Education, the Department of Housing and Urban Development, the Department of the Interior, the Department of Labor, the Department of Transportation, the Agency for International Development, the Community Services Administration, the Environmental Protection

Agency, the General Services Administration, the National Aeronautics and Space Administration, the *Nuclear Safety Agency*, the Small Business Administration, the United States Information Agency, the Veterans' Administration, and the Department of State;

* * * * * * *

TRANSFER OF FUNCTIONS

SEC. 9. (a) There shall be transferred—

(1) to the Office of Inspector General—

(A) * * *

* * * * * * *

(M) of the Nuclear Regulatory Commission, the offices of that agency referred to as the "Office of Inspector and Auditor";

[(M)] *(N)* of the Small Business Administration, the office of that agency referred to as the "Office of Audits and Investigations"; and

[(N)] *(O)* of the Veterans' Administration, the offices of that agency referred to as the "Office of Audits" and the "Office of Investigations"; and

* * * * * * *

DEFINITIONS

SEC. 11. As used in this Act—

(1) the term "head of the establishment" means the Secretary of Agriculture, Commerce, Defense, Education, Housing and Urban Development, the Interior, Labor, or Transportation [or], the Administrator of the Agency for International Development, Community Services, Environmental Protection, General Services, National Aeronautics and Space, Small Business, or Veterans' Affairs, or the Director of the United States Information Agency; *or the Administrator of the Nuclear Safety Agency*, as the case may be;

(2) the term "establishment" means the Department of Agriculture, Commerce, Defense, Education, Housing and Urban Development, the Interior, Labor, [or] Transportation, the Agency for International Development, the Community Service Administration, the Environmental Protection Agency, the General Services Administration, the National Aeronautics and Space Administration, *The Nuclear Safety Agency*, the Small Business Administration, the United States Information Agency, or the Veterans' Administration, as the case may be;

* * * * * * *

ENERGY REORGANIZATION ACT OF 1974

AN ACT To reorganize and consolidate certain functions of the Federal Government in a new Energy Research and Development Administration and in a new Nuclear Regulatory Commission in order to promote more efficient management of such functions.

* * * * * * *

OFFICE OF NUCLEAR REACTOR REGULATION

SEC. 203. (a) There is hereby established in the Commission an Office of Nuclear Reactor Regulation under the direction of [a Director] *an Assistant Administrator* of Nuclear Reactor Regulation, who shall be appointed by the Commission, who may report directly to the Commission[, as provided in section 209,] and who shall serve at the pleasure of and be removable by the Commission.

(b) Subject to the provisions of this Act, [the Director] *the Assistant Administrator* of Nuclear Reactor Regulation shall perform such functions as the Commission shall delegate, including:

(1) Principal licensing and regulation involving all facilities, and materials licensed under the Atomic Energy Act of 1954, as amended, associated with the construction and operation of nuclear reactors licensed under the Atomic Energy Act of 1954, as amended.

(2) Review the safety and safeguards of all such facilities, materials, and activities, and such review functions shall include, but not be limited to—

(A) monitoring, testing and recommending upgrading of systems designed to prevent substantial health or safety hazards; and

(B) evaluating methods of transporting special nuclear and other nuclear materials and of transporting and storing high-level radioactive wastes to prevent radiation hazards to employees and the general public.

(3) Recommend research necessary for the discharge of the functions of the Commission.

(c) Nothing in this section shall be construed to limit in any way the functions of the Administration relating to the safe operation of all facilities resulting from all activities within the jurisdiction of the Administration pursuant to this Act.

OFFICE OF NUCLEAR MATERIAL SAFETY AND SAFEGUARDS

SEC. 204. (a) There is hereby established in the Commission an Office of Nuclear Material Safety and Safeguards under the direction of [a Director] *an Assistant Administrator* of Nuclear Material Safety and Safeguards, who shall be appointed by the Commission, who may report directly to the Commission [as provided in section 209,] and who shall serve at the pleasure of and be removable by the Commission.

(b) Subject to the provisions of this Act, the [Director] *Assistant Administrator* of Nuclear Material Safety and Safeguards shall perform such functions as the Commission shall delegate including:

(1) Principal licensing and regulation involving all facilities and materials, licensed under the Atomic Energy Act of 1954, as amended, associated with the processing transport, and han-

dling of nuclear materials, including the provision and maintenance of safeguards against threats, thefts, and sabotage of such licensed facilities, and materials.

(2) Review safety and safeguards of all such facilities and materials licensed under the Atomic Energy Act of 1954, as amended and such review shall include, but not be limited to—

(a) monitoring, testing, and recommending upgrading of internal accounting systems for special nuclear and other nuclear materials licensed under the Atomic Energy Act of 1954, as amended;

(B) developing, in consultation and coordination with the Administration, contingency plans for dealing with threats, thefts, and sabotage relating to special nuclear materials, high-level radioactive wastes and nuclear facilities resulting from all activities licensed under the Atomic Energy Act of 1954, as amended;

(C) assessing the need for, and the feasibility of establishing a security agency within the office for the performance of the safeguards functions, and a report with recommendations on this matter shall be prepared within one year of the effective date of this Act and promptly transmitted to the Congress by the Commission.

(3) Recommending research to enable the Commission to more effectively perform its functions.

(c) Nothing in this section shall be construed to limit in any way the functions of the Administration relating to the safeguarding of special nuclear materials, high-level radioactive wastes and nuclear facilities resulting from all activities within the jurisdiction of the Administration pursuant to this Act.

OFFICE OF NUCLEAR REGULATORY RESEARCH

SEC. 205. (a) There is hereby established in the Commission an Office of Nuclear Regualtory Research under the direction of [a Director] *an Assistant Administrator* of Nuclear Regulatory Research, who shall be appointed by the Commission, who may report directly to the Commission[, as provided in section 209], and who shall serve at the pleasure of and be removable by the Commission.

(b) Subject to the provisions of this Act, the [Director] *Assistant Administrator* of Nuclear Regulatory Research shall perform such functions as the Commission shall delegate including:

(1) Developing recommendations for research deemed necessary for performance by the Commission of its licensing and related regulatory functions.

(2) Engaging in or contracting for research which the Commission deems necesssary for the performance of its licensing and related regulatory functions.

(c) The Administrator of the Administration and the head of every other Federal agency shall—

(1) cooperate with respect to the establishment of priorities for the furnishing of such research services as requested by the Commission for the conduct of its functions;

(2) furnish to the Commission, on a reimbursable basis, through their own facilities or by contract or other arrange-

ment, such research services as the Commission deems necessary and requests for the performance of its functions; and

(3) consult and cooperate with the Commission on research and development matters of mutual interest and provide such information and physical access to its facilities as will assist the Commission in acquiring the expertise necessary to perform its licensing and related regulatory functions.

(d) Nothing in subsections (a) and (b) of this section or section 201 of this Act shall be construed to limit in any way the functions of the Administration relating to the safety of activities within the jurisdiction of the Administration.

(e) Each Federal agency, subject to the provisions of existing law, shall cooperate with the Commission and provide such information and research services, on a reimbursable basis, as it may have or be reasonably able to acquire.

(f) The Commission shall develop a long-term plan for projects for the development of new or improved safety systems for nuclear powerplants.

OFFICE OF INVESTIGATIONS

SEC. 205A. (a) There is hereby established in the Agency an Office of Investigations under the direction of an Assistant Administrator for Investigations, who shall be appointed by the Administrator, who shall report directly to the Administrator and who shall serve at the pleasure of and be removable by the Administrator.

(b) Subject to the provisions of this Act, the Assistant Administrator for Investigations shall perform such functions as the Administrator shall designate, including investigations into possible violations of the Atomic Energy Act, the Energy Reorganization Act, or any other statutes that the Administrator is responsible for implementing, and rules, regulations, orders, and license conditions issued by the Agency thereunder, that may involve intent or purpose to commit such violation, or that may have arisen as a result of careless disregard, deception, or other indications of willful intent.

(c) The Assistant Administrator for Investigations may initiate an investigation at the request of the Administrator, Deputy Administrator, or a Regional Administrator. The Assistant Administrator for Investigations may initiate an investigation on his or her own initiative, unless the Administrator determines that the public health and safety requires otherwise specifically with respect to such investigation.

(d) Any employee of the Agency obtaining information concerning possible violations falling within the scope of authority of the Office of Investigations shall promptly provide such information to the Office of Investigations.

(e) Whenever the Assistant Administrator for Investigations has reasonable grounds to believe that there has been a violation of Federal criminal law, the Assistant Administrator, after notifying the Administrator, shall report such violation to the Attorney General. Neither the Administrator nor any other employee of the Agency shall prevent or prohibit the Assistant Administrator from reporting such violations to the Attorney General.

[NONCOMPLIANCE

[SEC. 206. (a) Any individual director, or responsible officer of a firm constructing, owning, operating, or supplying the components of any facility or activity which is licensed or otherwise regulated pursuant to the Atomic Energy Act of 1954 as amended, or pursuant to this Act, who obtains information reasonably indicating that such facility or activity or basic components supplied to such facility or activity—

[(1) fails to comply with the Atomic Energy Act of 1954, as amended, or any applicable rule, regulation, order, or license of the Commission relating to substantial safety hazards, or

[(2) contains a defect which could create a substantial safety hazard, as defined by regulations which the Commission shall promulgate,

shall immediately notify the Commission of such failure to comply, or of such defect, unless such person has actual knowledge that the Commission has been adequately informed of such defect or failure to comply.

[(b) Any person who knowingly and consciously fails to provide the notice required by subsection (a) of this section shall be subject to a civil penalty in an amount equal to the amount provided by section 234 of the Atomic Energy Act of 1954, as amended.

[(c) The requirements of this section shall be prominently posted on the premises of any facility licensed or otherwise regulated pursuant to the Atomic Energy Act of 1954, as amended.

[(d) The Commission is authorized to conduct such reasonable inspections and other enforcement activities as needed to insure compliance with the provisions of this section.]

NONCOMPLIANCE

SEC. 206. (a) Any firm constructing, owning, operating, or supplying the components of any facility or activity which is licensed or otherwise regulated pursuant to the Atomic Energy Act of 1954, as amended, or pursuant to this Act, and any individual director or responsible officer of such a firm, obtaining information reasonably indicating that such facility or activity or basic components supplied to such facility or activity—

(1) fails to comply with the Atomic Energy Act of 1954, as amended, or any applicable rule, regulation, order, or license of the Agency relating to substantial safety hazards, or

(2) contains a defect which could create a substantial safety hazard, as defined by regulations which the Agency shall promulgate,

shall immediately notify the Agency of such failure to comply, or of such defect, unless such firm or individual has actual knowledge that the Agency has been adequately informed of such defect or failure to comply.

(b) The Administrator is authorized to issue such regulations and orders as may be necessary to ensure compliance with this section, including regulations and orders requiring any firm subject to this section to devise and implement procedures to identify, evaluate, and report defects.

(c) Any firm or individual who violates any regulation or order issued under subsection (b) of this section shall be subject to a civil penalty in the same manner and amount as for violations subject to a civil penalty under section 234 of the Atomic Energy Act of 1954, as amended.

(d) The requirements of this section shall be prominently posted on the premises of any firm subject to this section.

(e) The Agency is authorized to conduct such reasonable inspections, investigations, and other enforcement activities as needed to ensure compliance with the provisions of this section and with any regulations and orders issued thereunder.

(f) For purposes of this section, the term "firm" shall have the meaning provided for the term "person" in subsection 11 s. of the Atomic Energy Act of 1954, as amended, except that it shall include the Department of Energy to the extent that its facilities, materials, or activities are licensed by the Agency and shall not include an "individual."

APPENDICES

In conjunction with the hearings conducted by the Subcommittee on Nuclear Regulation on the organization and operation of the Nuclear Regulatory Commission, the Subcommittee examined a wide range of specific cases or initiatives that have come before the Nuclear Regulatory Commission. In addition, the Subcommittee examined, in a more general way, the manner in which the Commission carries out it business, including the procedures for conducting meetings and arriving at decisions, the role of the Office of Management and Budget in the agency's decisionmaking process, and the role of various industry organizations in the regulatory process.

The appendices that follow set forth what the Subcommittee considers to be the essential factual information in each of the areas examined, accompanied by discussion and conclusions. The appendices are organized a follows:

- Appendix 1. Internal Agency Investigations.
  - A. Organization and Operation of the Office of Inspector and Auditor.
  - B. Stello-White Telephone Conversation.
    - Discussion and Conclusions.
  - C. Release of Nuclear Regulatory Commission Document from the Office of Commissioner Roberts.
    - Discussion and Conclusions.
  - D. Comanche Peak.
    - Discussion and Conclusions.
- Appendix 2. External Licensee Investigations.
  - A. Introduction.
  - B. Background.
  - C. Development of Staffing Levels; Investigative Policy and Procedures.
  - D. Reporting Relationship of OI Continued Discussion of Staffing Level.
  - E. Thresholds for OI Referrals to the Department of Justice.
  - F. Thresholds for OI Investigations.
  - G. Investigations of Licensee Character and Integrity.
  - H. Investigation Referral Board.
  - I. Investigative Policies Pertaining to the Authority and Responsibility of OI.
- Appendix 3. Agency Policy Statements.
  - A. Introduction.
  - B. Training and Qualification Policy Statement.
  - C. Fitness for Duty Policy Statement.
  - D. Maintenance Policy Statement.
  - E. Subjects Addressed in Commission Policy Statements.
  - F. Conclusions.
- Appendix 4. Agency Enforcement.
  - A. Reopening of Enforcement Cases.

Appendix 5. Control of Nuclear Regulatory Commission Documents.

Appendix 6. Agency Procedures fo Meetings Between NRC Staff and Persons Outside the Agency.

Appendix 7. Industry Organizations.

A. Institute of Nuclear Power Operations.

B. Nuclear Management and Resources Council.

Appendix 8. Agency Procedures—Meetings and Decisionmaking.

Appendix 9. Role of the Office of Management and Budget.

Appendix 10. Abnormal Occurrences.

A. Criteria for Declaring Abnormal Occurrences at Nuclear Power Plants.

APPENDIX 1. INTERNAL AGENCY INVESTIGATIONS

A. ORGANIZATION AND OPERATION OF THE OFFICE OF INSPECTOR AND AUDITOR

The Office of Inspector and Auditor (OIA) was established by the Nuclear Regulatory Commission on January 20, 1975, at the time that the agency itself was first established, for the purpose of auditing agency programs and investigating misconduct by agency employees and contractors. It was affirmed as an office by the President in Reorganization Plan No. 1 of 1980. It operates in accordance with the provisions of the Atomic Energy Act of 1954, as amended,[1] the Energy Reorganization Act of 1974,[2] the Budget and Accounting Procedures Act of 1950,[3] and Office of Management and Budget Circulars A-50 and A-73.

OIA is staffed by a Director, a Deputy Director, an Assistant Director for Audits, and an Assistant Director for Investigations; in addition, OIA has ten auditors, six investigators, a half-time computer systems analyst, three secretaries, and two technical assistants. The Director of OIA reports directly to the full Commission and is outside the staff or line management function of all NRC organizations except the Commission. Within OIA, the assistant directors for audit and investigations report to the Director of OIA. For fiscal year 1988, OIA's authorized staffing level was 26 Full Time Equivalency Positions.

Under the charter governing the activities of OIA,[4] the Office is charged with carrying out the following responsibilities:

1. developing and recommending to the Commission policies and standards governing NRC's financial and management audit program;
2. planning and directing NRC's long-range comprehensive audit program;
3. conducting NRC's day-to-day internal audit activity at all levels of operations to determine whether financial operations are conducted properly, financial reports are presented fairly, there is compliance with applicable laws and regulations, resources are managed and used economically and efficiently, and desired program results and objectives are being achieved effectively; evaluating internal controls, within the scope of audits and investigations; and providing audit results to appropriate NRC officials;

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[1] 42 U.S.C. 2011 *et seq.*

[2] 42 U.S.C. 5801 *et seq.*

[3] 31 U.S.C. 1101 *et seq.*

[4] U.S. Nuclear Regulatory Commission Manual, Chapter 0113, Organization and Functions, Office of Inspector and Auditor (approved July 7, 1986).

4. conducting investigations and inquiries to ascertain and verify the facts and regard to the integrity of all NRC programs and operations;

5. investigating:

(A) possible irregularities or alleged misconduct of NRC employees;

(B) allegations or wrongdoing by NRC contractors;

(C) claims for personal property loss or damage at the request of the Executive Director for Operations or the Director, Office of Administration, and submitting reports of findings to the requesting office;

(D) tort claims against the United States when appropriate, and upon the request of the General Counsel;

(E) fraud, waste, and mismanagement;

(F) other activities relating to the administration of NRC programs and operations, as appropriate;

6. referring suspected or alleged criminal violations to the Department of Justice, including U.S. Attorneys and the Federal Bureau of Investigation, after appropriately informing the Office of General Counsel;

7. hearing individual employee concerns regarding NRC operations and activities and investigating, as appropriate, such concerns;

8. maintaining liaison with audit and Inspector General organizations and other law enforcement agencies in criminal and other investigative matters;

9. providing interim and final reports and recommendations to the Commission and/or other NRC officials as appropriate on the results of audits, investigations and inquiries.

10. making such reports to the Commission, as necessary, to keep the Commission fully informed on its financial management responsibilities; and

11. carrying out such other functions as are assigned by the Commission.

Both the audit and investigative responsibilities of OIA are limited to internal programs and activities of the Agency and, to this extent, OIA functions in much the same manner as the offices of Inspector General that have been established in most executive departments and some agencies under the Inspector General Act of 1978, as amended.[5]

OIA's investigative function is for the purpose of overseeing the integrity of NRC programs and operations and to uncover irregularities and misconduct by NRC employees and contractors. OIA initiates its investigations based upon allegations or referrals received from other NRC offices or other sources such as newspaper articles or NRC correspondence. The Director may initiate an investigation on his or her own initiative without receiving prior approval from the NRC's Executive Director for Operations or from the Commission.

When criminal activities are first suspected, OIA makes a preliminary referral of the matter either orally or in writing to DOJ.

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[5] 5 U.S.C. App. 3., Sec. 1 *et seq.*

According to OIA, preliminary referrals are usually made—(1) because declination of prosecution is likely due to the lack of evidence, or because of the improbability of developing evidence, the relatively minor nature of the offense, or the relatively technical nature of the alleged violation; (2) because there are sound reasons to believe the ongoing investigation should be conducted by DOJ; or (3) to obtain a legal opinion concerning whether a potential criminal violation exists. Oral referrals are followed by a letter to confirm the referral and the opinions rendered by DOJ. On other than preliminary referrals, suspected criminality is referred by OIA to DOJ by forwarding the OIO Report of Investigation with a cover referral letter. The purpose of the cover referral letter is to impart information helpful to DOJ in making a prosecutive decision. DOJ informs OIA in writing once a decision regarding criminal prosecution is reached.[6]

OIA performs its criminal investigations to determine whether these have been violations by agency employees of the Federal Criminal Code, the Atomic Energy Act (criminal provisions, 42 U.S.C. sections 2272 *et seq.* and implementing regulations found at 10 C.F.R. Chapter I), and other Federal statutes pertaining to Federal employees set forth in titles 5, 31, and 40 of the United States Code.

OIA estimates that currently 40 percent of its work is investigation-related and 60 percent is audit-related. OIA receives approximately 85 allegations of criminal misconduct per year. Of these allegations, it formally investigates 40 to 50. On the average, it makes about 10 referrals per year to the Department of Justice. The decision to make a referral to DOJ lies solely with OIA. Under the guidelines governing such referrals, however, OIA is required to inform the Office of General Counsel before formally referring a case.[7]

On the audit side, OIA averages about 20 new audits per year and about the same number of follow-up audits per year. Over the past three years, an average of eight suggestions annually have been made by the Executive Director for Operations (EDO) for areas to be audited; an average of 47 percent of the suggestions made by the EDO are accepted by OIA. Of the total audit work done by OIA, fourteen percent of that work is initiated as a result of suggestions made by the EDO.[8]

While OIA has no jurisdiction to audit or investigate the activities of NRC licensees, there are occasional instances where, due to the nature of the matter under investigation, OIA's responsibilities require coordination with the NRC's Office of Investigations (OI).[9] According to the Commission, sixty seven investigation and/or inquiries opened by OIA during fiscal years 1985, 1986, and 1987 had a nexus to the public health and safety and potentially involve licensees. These cases represent about 25% of the cases opened by OIA in those three years.[10]

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[6] Letter from Lando W. Zech, Jr., Chairman, U.S. Nuclear Regulatory Commission to the Honorable John Breaux, Chairman, Subcommittee on Nuclear Regulation, Mar. 1, 1988, responding to questions from the Subcommittee.

[7] *Id.*

[8] *Id.*

[9] For a more detailed discussion of the jurisdiction of the Office of Investigations, see Appendix 2.

As stated above, OIA reports to the full Commission and, therefore, the Commission has the authority to direct OIA to terminate an investigation. A direction from the Commission for OIA to terminate an investigation, however, would require the approval of a majority of the Commissioners. OIA has no record of, and the current employees of OIA do not recall, any OIA investigation being halted by the Commission.[11]

With respect to investigations of individual Commissioners or their immediate staff by OIA, the Commission's General Counsel has advised that—

> [A] Commissioner is an "employee" for purposes of the jurisdiction of OIA to investigate allegations of misconduct, at least to the extent that the actions alleged constitute a violation of restrictions reflected in statutes or executive orders. We have found no basis in existing written guidance to suggest that different procedures apply to investigations of Commissioners or members of their staffs and to other NRC employees. To the extent we have found pertinent guidance, it suggests that all NRC employees are to be treated alike for purposes of OIA investigations.[12]

In 1981, the General Accounting Office recommended that "in view of the critical importance of effective and efficient regulation to the future of commercial nuclear activities, Congress should consider establishing an Office of Inspector General at NRC" to perform the functions currently performed by OIA.[13]

As part of the Subcommittee's inquiry into the organization, operation, and effectiveness of OIA, the Subcommittee examined three specific cases that come within the jurisdiction of OIA. A detailed discussion of those cases follows.

B. STELLO-WHITE TELEPHONE CONVERSATION

On December 19, 1985, then-NRC Commissioner James K. Asselstine visited the Tennessee Valley Authority (TVA) for a briefing on the condition of the Watts Bar Nuclear Plant, a plant which TVA had previously certified to be ready for fuel loading. During the visit, the TVA's Nuclear Safety Review Staff (NSRS) made a presentation to the Commissioner which indicated that the quality assurance program for the plant was not in compliance with the NRC requirements of 10 C.F.R. Part 50, Appendix B. During the meeting, TVA's management noted that NSRS's perceptions of the status of Watts Bar did not necessarily reflect TVA's corporate position.

As a consequence of that meeting, the NRC's Office of Nuclear Reactor Regulation sent a letter, dated January 3, 1986, to the

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[10] Letter from Lando W. Zech, Jr., *supra* note 6.

[11] *Id.*

[12] Memorandum to the Commissioners from William C. Parler, General Counsel, Apr. 17, 1987.

[13] Improvements needed in the Nuclear Regulatory Commission's Office of Inspector and Auditor, EMD-81-72, July 9, 1981, p. 33.

TVA Manager of Power and Engineering (Nuclear) which requested the following:

> In order to assist the NRC in determining whether or not TVA is in violation of the Commission's Rules and Regulations, and your Construction Permit, you are requested to furnish under oath or affirmation, TVA's corporate position with respect to whether or not 10 CFR Part 50, Appendix B requirements are being met at the Watts Bar Facility. This position should be provided in writing no later than January 9, 1986.[14]

On January 7, a meeting was held at NRC headquarters to discuss the January 3rd letter. Attendees at the meeting included the Chairman of the TVA Board of Directors, C.H. Dean, Jr., the Director of NRC's Office of Nuclear Reactor Regulation, Harold R. Denton, and NRC's Executive Director for Operations, Victor Stello, Jr. The NRC agreed at that meeting to extend the January 9 deadline for a TVA response in view of the fact that Steven A. White, who had been retained by TVA to head up its nuclear recovery program, was not scheduled to report for duty until January 13, 1986. In a letter memorializing the meeting, Dean stated "[t]his situation apparently involves differing professional opinions within TVA, and we will expect Mr. White to look into the matter as soon as is reasonably possible. We will then respond to you with TVA's corporate position." [15]

Following that meeting, and prior to TVA's official response to the NRC letter on March 20, 1986, according to telephone logs that were kept by Mr. White of his telephone conversations,[16] a number of conversations took place between White and various representatives of the NRC, including the following telephone conversations with top NRC officials:

Date	Conversation
Jan. 28, 1986	White conversation with Commissioner Asselstine.
Jan. 28, 1986	White conversation with Chairman Palladino.
Jan. 28, 1986	White conversation with Commissioner Zech.
Jan. 28, 1986	White conversation with Commissioner Roberts.
Jan. 28, 1986	White conversation with Commissioner Bernthal.
Jan. 28, 1986	White conversation with Harold Denton.
Jan. 28, 1986	White conversation with James Taylor.
Mar. 20, 1986	White conversation with Harold Denton.
Mar. 20, 1986	White conversation with Victor Stello.

In addition to these conversations noted in the White phone log, on March 19, 1986, at approximately 5:00 p.m., a 15 minute telephone conversation occurred between Commissioner James K. Asselstine and Mr. White. Mr. White thinks, but is not certain, that he discussed the content of the TVA's response to the Commission's January 3 letter with Commissioner Asselstine.[17]

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[14] Letter from Harold R. Denton, Director, Office of Nuclear Reactor Regulation, Nuclear Regulatory Commission, to H.G. Parris, Manager of Power & Engineering (Nuclear), Tennessee Valley Authority, Jan. 3, 1986.

[15] Letter from C.H. Dean, Jr., Chairman, Tennessee Valley Authority, to Harold R. Denton, Director, Office of Nuclear Reactor Regulation, Nuclear Regulatory Commission, Jan. 9, 1986.

[16] Copies of Mr. White's telephone logs were provided to the Subcommittee on July 20, 1987 by Mr. Gerald Charnoff, Mr. White's attorney.

On March 20, 1986, TVA responded to NRC's request for its corporate position as to whether 10 CFR Part 50, Appendix B requirements were being met at Watts Bar.[18] The letter, which was notarized and signed by White, states in pertinent part:

> On the basis of a review of the issues identified in the NSRS Perceptions, as reflected in the enclosure, I find that there has been no pervasive breakdown of the quality assurance (QA) program; that problems have been identified; and that TVA has remedied or will remedy all identified design/construction deficiencies and noncompliances, and that accordingly, the overall QA program is in compliance with 10 CFR Part 50, Appendix B.[19]

According to White's telephone logs, following submission by TVA of the letter of March 20, 1986, the following additional conversations took place between White and NRC officials:

Date	Conversation
Mar. 21, 1986	White conversation with Victor Stello.
Mar. 21, 1986	White conversation with Harold Denton.
Mar. 30, 1986	White conversation with Victor Stello.

[This letter conversation, which was identified as having taken place on March 30 in the telephone logs of Mr. White, appears to have been incorrectly recorded and instead may actually have occurred on March 20.]

[Copies of the White phone logs provided to the Subcommittee on July 20, 1987 have been reproduced at the end of this Part.]

At some point following the telephone conversations that occurred in March, Ben B. Hayes, Director of NRC's Office of Investigations, learned of the conversation involving Stello. According to Hayes:

> During a discussion with Mr. Harold Denton, [then-Director of NRC's Office of Nuclear Reator Regulation] Mr. Denton made it known to me that Mr. Stello [NRC's Executive Director for Operations] had discussed the Appendix B matter with Mr. White and the conversation took place while Mr. Stello, Mr. Denton and Mr. Taylor [then-Director of NRC's Office of Inspection and Enforcement] were together in an automobile. I am uncertain whether the conversation took place prior to or after Mr. White officially submitted his response to us. But his response was notarized, and in my opinion, I think the response is an important document.

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[17] Interview of Gerald Charnoff by Jon Barker, Subcommittee Investigator, July 20, 1987.

[18] Letter from S.A. White, Manager of Nuclear Power, Tennessee Valley Authority, to Harold R. Denton, Director of Nuclear Reactor Regulation, Nuclear Regulatory Commission, Mar. 20, 1986.

[19] *Id.*

> I raised the matter with Mr. Jim Taylor, the Director of I&E. Mr. Taylor indicated, yes, the conversation took place, and that he, Taylor, was uncomfortable with the conversation. I have no idea as to what transpired during the conversation.[20]

On April 7, 1986, Hays raised the matter with Nunzio J. Palladino, then-Chairman of the Commission:

> My concern as expressed to Mr. Norm Haller [Chairman Palladino's Executive Assistant] and Chairman Palladino was that the Steve White response which indicates and states that Watts Bar is in fact in compliance with Appendix B on the eight to 10 issues raised by NSRS, that any discussion prior to the formal submission of that letter or after submission of the letter should be on the record to avoid the perception of any improprieties.
>
> I am unware as to what transpired during the conversation, but my concern was in light of the fact that we already had an on-going material false statement investigation on a previous letter indicating Watts Bar was ready to be licensed, that any response from Mr. White would certainly play a role in that investigation. And I'm of the opinion that we should deal with Mr. White in an arm's length transaction. That is, it should be on the record, especially when discussing issues that may fall within the investigatory arena.
>
> When I brought the matter to Mr. Haller's attention, he indicated that Mr. Stello talks frequently with Mr. White, and I told Mr. Haller that certainly the EDO or any other staff person must be able to communicate with TVA management, but my concern was if there is communication in an informal fashion on these major issues, that it puts us in a defensive position because the perception, in my view, is not good. But at the same time, we must be able to communicate to TVA without documenting every discussion at every level.[21]

Hayes and the Chairman then discussed what steps should be taken in view of the concerns that he raised:

> After discussing the matter with the chairman, he asked for my recommendation, not knowing all of the facts, most notably what actually transpired during the conversation, I told him we should just wait and see what evolves from Steve White's response. However, he indicated he wished that I discuss the matter with Ms. Connelly [Director of OIA], which I did the same afternoon.[22]

Accordingly, on that same day, April 7, 1986, Hayes reported his concern regarding the Stello-White phone conversation to OIA Director Connelly and an investigation was initiated. OIA investigators took Hayes' statement on April 11.[23] According to Hayes' statement to the investigators, Denton did not indicate to Hayes that he had any reservations or felt uncomfortable about the Stello-White telephone conversation. Nevertheless, based upon a separate discussion that Hayes had had with Taylor following his conversation with Denton, in which Taylor indicated that he "was uncomfortable with the conversation", Hayes expressed his concern about the propriety of the conversation. Moreover, Hayes indicated that he was concerned about the conversation in view of the fact that OI had a separate investigation underway at that time to determine whether another TVA Official, Hugh Parris, had made a material false statement in February of 1985 when he indicated that the Watts Bar plant was ready to be licensed.[24]

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[20] Investigative Interview of Ben B. Hayes by the Office of Inspector and Auditor, Nuclear Regulatory Commission, Apr. 11, 1986, pp. 3-4.

[21] *Id.*, pp. 3-4.

[22] *Id.*, pp. 4-5.

OIA interviewed Denton on June 10, 1986,[25] and Taylor on June 16, 1986.[26] Interview summaries prepared by OIA of the Denton and Taylor interviews, rather than complete transcripts, were included in the OIA report. The OIA summaries state in pertinent part that—

> DENTON felt that WHITE was pressing too hard for pre-approval and believed that this matter should have been handled by the NRC in a more hands-off manner because it was a highly controversial issue. DENTON did not believe that STELLO compromised the NRC position by his discussion with WHITE.[27] TAYLOR stated to OIA that based on the issues and complexity of the situation at TVA, he believed that the telephone conversation between STELLO and WHITE was inappropriate. It made TAYLOR feel uncomfortable because he knew the ball was in TVA's court and the staff should have stayed out of it until NRC received the TVA letter.[28]

OIA investigators interviewed Stello some three months after the telephone conversation took place. The transcript of his interview was included in the report. In response to a question concerning whether White had sought to utilize Stello's office in having his response approved, Stello responded:

> Not at all. He knows the approval process, he knows what it is, he knows who he is working with. We have a senior management team which constitutes the way in which approval for what he does and doesn't do comes from. It comes from that management team and he knows that that is where the approval has to be. I think I viewed the content of this letter as an attempt by him to clarify a point that he thought was misunderstood. And the point, I believe, to say it in my words, was the way in which we read his original letter was not quite what he intended.[29]

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[23] Investigative Interview of Ben. B. Hayes, Apr. 11, 1986.
[24] *Id.*
[25] Report of Interview, Harold R. Denton, June 10, 1986.
[26] Report of Interview, James E. Taylor, June 16, 1986.
[27] Report of Interview, *supra* note 25.
[28] Report of Interview, *supra* note 26.
[29] Investigative Interview of Victor Stello, July 30, 1986, p. 6.

Neither Joseph J. Fouchard, Director of NRC's Office of Public Affairs, who was present in the van during the conversation, nor the driver were interviewed by OIA. Significantly, OIA never interviewed White, the other participant in the conversation.

On August 26, 1986, OIA apprised the NRC Office of General Counsel of the findings of its investigation. On that date, the General Counsel's office advised OIA that the facts and circumstances presented no apparent conflict of interest or impropriety on Stello's part.[30]

On August 28, 1986, OIA issued its Memorandum Report documenting its investigation of the Stello-White conversation. OIA stated that its inquiry "developed no information to substantiate any impropriety on the part of Stello during his conversation with White." [31]

On December 3, through 5, 1986, the NRC technical staff conducted a review of the documentation provided by TVA in support of White's March 20 statement that there was no pervasive breakdown of TVA's quality assurance program and that the overall QA program at Watts Bar was in compliance with 10 CFR Part 50, Appendix B. As a result of its review, the staff came to believe that the TVA documentation was not sufficient to substantiate that a breakdown in the quality assurance program did not exist.[32]

Consequently, as a result of the review by the technical staff, Stello sent a memorandum "Request For Investigation" to Mr. Hayes, Director of NRC's Office of Investigations (OI), on January 13, 1987.[33] The memorandum requested that OI investigate whether TVA/Mr. White had misrepresented the status of the Watts Bar facility with respect to an issue material to the licensing of that plant. The memorandum also requested that OI investigate the extent to which such action was intentional, and the levels of management involved in the potential wrongdoing.[34]

The memorandum stated that a preliminary assessment by OI was needed by February 15, 1987, so that any required actions concerning possible TVA management changes could be implemented in a time frame to support the restart of Sequoyah, another TVA nuclear power plant then shut down. In view of this, the staff requested that OI give the investigation high priority.[35] [Based upon the investigation conducted by OI, this matter has since been referred to the Department of Justice, where it is currently pending.]

The propriety of the conversation between Stello and White was discussed at a hearing on April 9, 1987, before the Committee on Governmental Affairs of the United States Senate.[36] At the hearing, Hayes testifed that the March 20, 1986 conversation between Stello and White "appeared to be an improper contact".[37] Hayes explained the background:

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[30] Memorandum Report, OIA File 186-30, Aug. 28, 1986, p. 2.

[31] Memorandum from Sharon R. Connelly, Director, Office of Inspector and Auditor, Nuclear Regulatory Commission, to the Commissioners, Aug. 29, 1986.

[32] Memorandum from Victor Stello, Jr. Executive Director for Operations, Nuclear Regulator Commission, to Ben B. Hayes, Director, Office of Investigations, Nuclear Regulatory Commission, Jan. 13, 1987.

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] Hearing before the Committee on Governmental Affairs, United States Senate, "Need for an Inspector General at the Nuclear Regulatory Commission", Apr. 9, 1987 (hereinafter referred to as "the Glenn hearing").

> I was informed by Mr. Harold Denton, Director of the Office of the Nuclear Reaction Regulation, that Mr. Stello had initiated a telephone call in his presence while the two of them, and other NRC staff, were returning from a meeting at the Commission offices on H Street in Washington, D.C.
>
> Mr. Denton related that the telephone call was to Mr. Steven White, the TVA manager of nuclear power, and that the conversation dealt with TVA's proposed response to the NRC's January 3rd letter.
>
> Mr. Denton was very uncomfortable with that because in his view, White should have responded without any advice from the Commission.
>
> Mr. Denton told me that Mr. James Taylor, director of IE, was also present in the van during that telephone call. In then went to Mr. Taylor and asked him about it, and Mr. Taylor confirmed that the call took place.
>
> I was very concerned on learning of that phone call as OI had an ongoing investigation regarding TVA, and one investigation in particular had addressed the issue of whether a former TVA manager had lied to the NRC concerning readiness of Watts Bar for fuel load. There would be no reason for a licensee not to try to get a reading from the NRC as to how best to handle a very difficult situation such as a reply to that letter; however, in my view it would be improper for the NRC to give it.[38]

Mr. Hayes further testified that in his views:

> [A] fair characterization of this matter was that a very senior NRC official was in contact with the licensee in a way that created the impression that the official tipped the licensee as to how they should answer a particular inquiry which was also the subject of an OI investigation.[39]

He stated further,

> [i]n my view, this was a very serious sensitive matter that deserved an expeditious review and investigation, and that especially concerning the stature of Mr. Stello in the NRC structure, an investigation should be quick, complete, and thorough.[40]

In response to this testimony, Stello stated:

> In summary, both my conversations with Mr. White of TVA, only one of which has been the subject of criticism by Mr. Hayes and about which two of my senior staff members felt "uncomfortable":

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[37] *Id.*, p. 40.
[38] *Id.*, pp. 40-41.
[39] *Id.*, p. 42.
[40] *Id.*, p. 41.

> —were initiated by Mr. White;
> —transmitted no substantive information to Mr. White;
> —centered upon emphasizing the needs of the NRC for full and complete information; and
> —were in the interest of the regulatory functions of this agency. In those circumstances, I did not then and do not now see anything approaching impropriety in the conversation.[41]

In view of the renewed concern regarding the propriety of the conversation between Stello and White, as well as the concern over the manner in which the OIA investigation of this matter was conducted, the Subcommitee has reviewed this matter in detail.

Stello has either given testimony, been deposed, or been interviewed several times concerning his conversations with Steven White regarding TVA's response to the NRC's January 3, 1986 letter. The Subcommittee has reviewed all available transcripts of such questions and responses; the Subcommittee has also interviewed Stello.[42]

Stello's statements, together with other available information, indicate that since White joined TVA, Stello, as well as other senior NRC management personnel and NRC Commissioners, had a number of telephone conversations with White.

When interviewed by OIA, Stello stated that:

> [O]n March 20, 1986, while in an NRC van, he received the telephone call from WHITE who believed it was important to call and read to STELLO the TVA letter responding to NRC's questions concerning whether WATTS BAR met the requirements of 10 CFR 50, Appendix B. During the conversation, STELLO suggested to WHITE that he needed to make the point in his letter that he (WHITE) was continuing to look at this particular issue and he would let the NRC know if he later found a problem. STELLO believed this was necessary because the scope of what WHITE did was limited and there was still much more reviewing to do. STELLO asserted that in no way did his discussion with WHITE constitute approval of the TVA response nor did he assist WHITE prepare the TVA letter.[43]

Stello recalled that in a second telephone conversation, he told White that he ought to finish his job of examining Watts Bar Appendix B compliance and then respond to the letter. Stello recalls that White responded that he (White) didn't think he could do what Stello had suggested because White had already made a commitment to the NRC that he would provide his response to the NRC's January 3 letter by a specific date.[44]

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[41] Letter from Victor Stello, Jr., Executive Director for Operations, Nuclear Regulatory Commission, to The Honorable John Glenn, Chairman, Committee on Governmental Affairs, United States Senate, Apr. 28, 1987.

[42] Interview of Victor Stello, Jr., by Jon Barker and Jack Bagnulo, Subcommittee Investigators, June 29, 1987.

[43] Summary of Interview of Victor Stello, Jr., conducted on July 30, 1986, Memorandum Report, Office of Inspector and Auditor, Aug. 28, 1986.

[44] Investigative Interview of Victor Stello, Apr. 11, 1986, p. 5.

Stello has also stated that at the time he had his conversation with White in the NRC van, Stello was not aware that TVA had put on file a fuel load application with the NRC, and consequently, was not aware that Hugh Parris, the previous senior TVA nuclear manager, was under investigation by the NRC's Office of Investigations for allegedly making a material false statement when attesting to the NRC that Watts Bar Unit I was ready for fuel load in April, 1985. According to Stello, he did not become aware that TVA had filed the application with the NRC until approximately April of 1986 when TVA sent the NRC a letter rescinding the original certification by Hugh Parris that Watts Bar was ready for fuel load.[45]

White's version of this matter, as represented to Committee investigators through his attorney, Mr. Charnoff, is essentially that he has no specific recollection of the telephone conversation in question.[46] Charnoff did, however, make available White's informal and edited notes of telephone conversations with the NRC between January and March 1986. [Portions of the telephone conversations noted in the log are discussed below and reflect the Subcommittee's understanding, based upon those notes, of what transpired in the various conversations. Copies of the complete White telephone logs are reproduced at the end of this Part.]

As best as can be determined, these notes suggested that various conversations took place between White and NRC officials concerning Watts Bar Appendix B issues and other TVA-related matters. One note indicates that a conversation took place between White and Stello in which Stello spoke from his home phone on March 20, 1986. According to White's notes, Stello indicated that he didn't want to put pressure on White [concerning Watts Bar Appendix B], that the two might end up in disagreement over the issue, which was significant. Apparently, Stello said something to the effect that if he were in White's shoes, he would wait before replying to the NRC letter, because TVA still did not have enough information to form a judgment on the matter. Stello also appears to have indicated that there was no need for White to make a decision until necessary.

White's informal telephone log also contains a notation of a telephone conversation with Stello concerning the Appendix B letter. The log notes that the date of this conversation is March 30, but the chronology in the telephone log suggests that this might be the March 20 conversation with Stello, in the NRC van, concerning the Appendix B issue. The log indicates that he (White) and two of his assistants would "help out any way I can." The two also discussed the need for White to contact Harold Denton regarding the matter. There is also part of a note which contains the words, "However specific item of noncompliance with appendix B—worried about HQ [Headquarters] didn't meet on this—".

Next, White's informal log indicates a March 20 conversvation with Harold Denton. Rather than attempt to interpret White's notes, those notes are quoted verbatim below:

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[45] Letter from Victor Stello, Jr., *supra* note 41.

[46] Interview of Gerald Charnoff by Jon Barker, Subcommittee Investigator, July 20, 1987.

3/20 Denton

Perception—2 parts. Today NIA with app. B.
(assure [illegible] ongoing are not in violation.
—In the past may [illegible] prob.
—Intent is to correct to.
—crossing bridge I don't have to.
—I still don't have completed investigations.
—He is worried his perception-helps.
—No information to the contrary.

Finally, of relevance here, the telephone log shows telephone calls to Stello and Denton on March 21. In the convesation with Stello, White indicated that he had changed a sentence in his draft; in the conversation with Denton, he indicated that he had added a sentence.

Three other NRC officials, Harold Denton, the then-Director of NRC's Office of Nuclear Reactor Regulation, James E. Taylor, the then-Director of NRC's Office of Inspection and Enforcement, and Joseph J. Fouchard, the Director of NRC's Office of Public Affairs, were present in the NRC van when Stello spoke with White, and generally recalled a telephone conversation between White and Stello in the NRC van on approximately March 20, 1986.

Denton indicated that he recalled that White had called Stello on the 20th of March, and according to Denton, White was "pressing too hard to preapproval." [47] Denton also recalled that White called him the following morning and told him that he had made some change in the letter.[48] [According to White's attorney, the change apparently referred to is the addition to the letter of the statement to the effect that White intended to continue the examination of QA activities within the nuclear power program, including those at Watts Bar, and that he would focus particularly in that programatic area.[49]

Taylor's recollection of the telephone call is generally consistent with that of Whate, Stello, and Denton. Taylor said he believed Stello told White in effect to take his time, make sure he was right. Taylor also indicated to the Subcommittee that in his opinion, it was inappropriate for White to call the EDO about QA at Watts Bar, because the official directly knowledgeable about this issue in the agency was Harold Denton. Taylor did not connect the telephone conversation in any way to the then-ongoing investigation, of TVA.[50] Joseph J. Fouchard of the NRC's Office of Public Affairs generally corroborated the Denton and Taylor statements.[51]

In view of the allegations raised at the April 9th hearing before the Committee on Governmental Affairs, the Office of Special Investigations of the United States General Accounting Office was asked to conduct an independent investigation of this matter by four members of the House of Representatives: Chairman Morris K. Udall, Subcommittee on Energy and the Environment, House Committee on Interior and Insular Affairs; Chairman John D. Dingell, Subcommittee on Oversight and Investigations, House Committee on Energy and Commerce; Chairman Philip R. Sharp, Subcommittee on Energy and Power, House Committeee on Energy and Commerce; and Congressman Edward J. Markey, Committee on Energy and Commerce, and Committee on Interior and Insular Affairs.[52] On April 22, 1988, the Office of Special Investigations released its report focusing on the propriety of the conversation between Stello and White and the thoroughness of the investigation of that matter by OIA.[53] GAO reached the following conclusions:

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[47] Report of Interview, *supra* note 25.
[48] Interview of Harold R. Denton by Jon Barker, Subcommittee Investigator, July 27, 1987.
[49] Interview of Gerald Charnoff, *supra* note 46.
[50] Interview of James E. Taylor by Jon Barker, Subcommittee Investigator, July 14, 1987.
[51] Interview of Joseph J. Fouchard by Jon Barker, Subcommittee Investigator, Feb. 24, 1988.

1. OIA's investigation of the alleged improper conversation between Stello and White was not sufficiently thorough. OIA failed to determine what it was investigating, e.g., there was inadequate effort devoted to determining the nature of what was said and the impact that the conversation had on the actions of either party. Furthermore, OIA failed to pursue the investigation in a timely and systematic manner. The investigation should not have been initiated without a proposed plan of action and specification of the rule, law, or regulation that might have been violated. This was evidenced during GAO's interviews of Ward, Mulley, and Connelly since not one of them could provide a convincing justification for their failure to interview White about the alleged improper conversation.
2. GAO was not able to develop any information indicating that Stello, Denton, or other NRC officials coached White on what position TVA should adopt to assure favorable action by the NRC. GAO learned in its interviews of Denton and Taylor that their discomfort with the Stello-White conversation was only because they felt White was going around them in dealing with Stello.
3. GAO's investigation substantiated that the Stello-White conversation did not contravene relevant NRC regulations as applied at the time in question.

SUBCOMMITTEE CONCLUSIONS

Based upon the investigation conducted by the Subcommittee, including the facts set forth in this Part, the Subcommittee has reached the following conclusions:

1. The Subcommittee found no evidence to indicate that the telephone conversation between Victor Stello, Jr. and Steven A. White of March 20, 1986 involved any improper effort by Stello to coach White through the preparation and submission of TVA's response to the Commission's letter of January 3, 1986.

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[52] Letter from Morris K. Udall, John D. Dingell, Philip R. Sharp, and Edward J. Markey to the Honorable Charles A. Bowsher, Comptroller General, U.S. General Accounting Office, June 22, 1987.

[53] Special Report, Office of Special Investigations, U.S. General Accounting Office, Apr. 22, 1988.

2. In the time frame investigated by the Subcommittee, from January through March of 1986, the Subcommittee found that a number of conversations occurred between White and various senior Nuclear Regulatory Commission officials, including all five Commissioners. The Subcommittee did not investigate the substance of these conversations. The fact that these conversations occurred, however, is not evidence of anything improper, in the Subcommittee's judgment.

3. The Subcommittee found that the mere fact that the various conversations, identified in 1 and 2 above, occurred after the January 3, 1986 NRC letter and prior to the March 29, 1986 TVA response did not contravene Commission policy in effect at such time regarding the propriety of such conversations.

4. The Subcommittee noted that on September 9, 1987, the Commission adopted a policy entitled "Guidance for NRC review of Licensee Documents." Under this policy, the Commission has declared that "NRC review of drafts of . . . licensee, applicant, or vendor enforcement-related . . . responses to 50.54(f) letters and similar requests for information specifically requested under oath or affirmation (excluding appropriate technical licensing documents) [would be improper]." [54]

5. The Office of Inspector and Auditor conducted an incomplete investigation of the March 20, 1986 telephone conversation between Stello and White, by failing to interview White, as well as the other officials present in the NRC van, including Joseph J. Fouchard and the driver of the van.

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[54] Memorandum from Victor Stello, Jr., Executive Director for Operations, Nuclear Regulatory Commission, to Office Directors and Regional Administrators, Nuclear Regulatory Commission, Sept. 9, 1987. For a more detailed discussion of the Commission's policies regarding the release of investigative and predecisional information to licensees and the review by NRC of licensee documents, see Appendix 5.

Copy given
to [illegible]
[illegible] 1/5/87

1/28 Gaselstein

Free to decide what -

- Confidentiality must be maintained
- How feed back to people who write
- Ltr to Grace. H&I at SQN
- anonymous/
- reasonable to him
- He will call off the dog

⊗ Q will have on his desk w/i 1 week

SQN - 2/10

1/28 Palladino

Talked to Stello - matter between TVA & QTC

- wait
- Call Vic Stello. no Ltr or conference ✓

1/28 Zeck

Update - Roberts & Bernthal

1/28 Roberts

up date. ~~foo~~ what you are doing sounds fine

1/28 Bernthal

1/28 Harold Denton

— signed out ltr on keeping records
preservation of integrity, access.
5 days before
— Ltr to Shum also.
- prohibit removal
- provide 5 days before relinquishing custody
- inspections
— NRC plans for activities
— Delay mtgs
— Region mtg on SQN Fri

1/28 Jim Taylor

worried about mtg commitment

✓

3/30 Stello

– appendix Bltr.

I will and Kelly & Kuhnle &
help out any way I can.

contact Denton

– would be better. [illegible]

Haeuer specific items of noncompliance

3/20 Dan Jones

Perception - 2 parts. Today NSA with appx B
(assume things going on are
not in isolation)

– In the past many humans had
probs! ✓

with ~~with~~ appendix B.

- warning about we didn't meet on this -

an element

~~useful~~

- moving down equipment to

~~copy~~

- [illegible] - on going investigation

Content is to correct to
— crossing bridge I don't
have to.
- I still don't have completed
investigation
- He is worried his perception —
helps
- No information to the contrary.

Team Review of I:H files. #7
technical issues not included conflict?
my need to know — confidentiality.
If they
are specific concerns — Con

- Possibly I.G. should think —
- Tomorrow

3/20 Stello 301-299-7692

- Didn't want to put pressure on me. We may end up in disagreement
- significant
- If he was in my shoes he would wait. Still don't have enough from QTC to form judgment – no need to make decision until necessary.
- SQN? – make decision before startup & deal with WBN when it comes up ✓

- creates controversy & I may have to withdraw
- what is gained
- allegation is WBN only
- no pressure from them HQ

C. RELEASE OF NRC DOCUMENT FROM THE OFFICE OF COMMISSIONER ROBERTS

On April 13, 1983, Ron Ridenhour, a reporter for Gambit Publications of Louisiana called Commissioner Victor Gilinsky's office and spoke with his technical assistant, James K. Joosten, about Ridenhour's concerns that there were quality assurance problems at the Waterford Nuclear Power Plant in Louisiana. On April 15, 1983, Joosten informed the Acting Director of NRC's Office of Inspection and Enforcement of the conversation that he had had with the Gambit reporter and requested that IE investigate the matter. After a number of further telephone calls between Ridenhour and Joosten, the reporter provided Joosten with some written materials detailing specific quality assurance problems at Waterford.

On June 8, 1983, Joosten sent a memorandum to R.C. DeYoung, the then-Director of NRC's Office of Inspection and Enforcement (IE) regarding the QA concerns that Ridenhour had identified at Waterford.[55] Attached to the memorandum, Joosten enclosed the letter that he had received from Ridenhour, together with various newspaper articles that Ridenhour had provided Joosten about the Waterford QA issue.

Joosten states in his memorandum that he was providing the documents to DeYoung in view of IE's interest in the Waterford QA issue, dating back to April 19, 1983, and in response to a request from James Taylor of IE for the information so that he might more carefully focus his review and investigation into their substance. Joosten indicated that he thought it would be appropriate for IE to take the lead on the matters raised in the Ridenhour letter and attachments.[56]

In his memorandum, Joosten called IE's attention to two specific items. The memorandum states:

> First, Mr. Ridenhour is very concerned over new cracks in the containment basemat which were discovered on May 11, 1983, by the licensee and may have been withheld from NRC review. Secondly, Mr. Ridenhour has expressed concerns on several occasions, over the degree of objectivity of regional inspectors, who reviewed initial QA and basemat cracking issues. He appears to feel there is some evidence to suggest collusion with the licensee.[57]

Joosten then strongly suggested that "appropriate measures be taken to assure an objective review" of the reporter's allegations. Copies of the memorandum were sent to the Executive Director for Operations, the Secretariat of the Commission, and the technical assistants of the other NRC Commissioners and the Chairman, D. Garner, J. Milhoan, S. Chestnut, and J. Austin.[58]

NRC's Office of Inspection and Enforcement reviewed the material provided by Ridenhour and determined that the allegations raised questions relating to matters of public health and safety, such that any additional information held by Gambit might be important. In addition, the NRC decided to pursue Ridenhour's concerns through its inspection and enforcement program. In accordance with the NRC's normal practices, IE decided to meet directly with Ridenhour to ascertain if additional and more specific information was available in the areas of concern.[59]

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[55] Memorandum from James K. Joosten, Technical Assistant to Commissioner Gilinsky, to Richard C. DeYoung, Director, Office of Inspection and Enforcement.

[56] *Id.*

[57] *Id.*

[58] *Id.*

In addition to IE's interest in this matter, the NRC's Office of Inspector and Auditor (OIA) also desired to interview Ridenhour to obtain any specific information concerning the alleged collusion between NRC and LP & L and the alleged complicity of NRC in QA problems at Waterford.[60]

Accordingly, on June 21, 1983, James Sniezek, Deputy Director of NRC's Office of Inspection and Enforcement, assigned an inquiry team to interview Ridenhour about his allegations.[61] On that same date, in a memorandum from DeYoung to Ben B. Hayes, Director, Office of Investigations, IE requested that OI provide investigative assistance in IE's inquiry to determine the specifics of Ridenhour's concerns.[62] On June 28, 1983, the inquiry team sought to interview Ridenhour about his concerns. Gary Esolen, Editor of Gambit, was present and acted as the spokesman for Gambit, but the inquiry team was not given the opportunity to interview Ridenhour.[63]

A second attempt was made to interview Ridenhour on June 29, but the NRC was unsuccessful. Ridenhour indicated that the Editor was deeply involved in the preparation of the articles and that he, Ridenhour, did not feel it was necessary to add to what Esolen had said.[64]

The results of the inquiry team's interview were presented to DeYoung, Director of NRC's Office of Inspection and Enforcement, on July 14, 1983.[65] The inquiry team's report identified three technical issues, all involving the Waterford QA program, for followup. One of these issues, a dispute over the QA program between LP & L and Combustion Engineering (CE), resulted in a recommendation from the inquiry team that certain documents identified by Gambit be examined and, to the extent necessary, that interviews should be conducted by NRC of LP & L and CE representatives involved in the QA program. The inquiry team noted that the NRC should provide the results of the examination, along with a a recommendation of which issues may require investigation, to the Office of Investigations. Furthermore, the report indicated that NRC's Office of Investigations (OI) should "review the results of inspection . . .

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[59] Letter from Nunzio J. Palladino, Chairman, Nuclear Regulatory Commission, to The Honorable Edward J. Markey, Chairman, Subcommittee on Oversight and Investigations, Committee on Interior and Insular Affairs, House of Representatives, Sept. 8, 1983, response to question 2.

[60] Memorandum from Mark W. Peranich, Chief, Construction, Vendor, and Special Program Section, Office of Inspection and Enforcement, Nuclear Regulatory Commission, to Richard DeYoung, Director, Office of Inspection and Enforcement, Nuclear Regulatory Commission, transmitting the Inquiry Team Report on Waterford QA Allegations, July 14, 1983.

[61] Memorandum from James H. Sniezek, Deputy Director, Office of Inspection and Enforcement, Nuclear Regulatory Commission, to Mark Peranich, Chief, Construction, Vendor & Special Program Section, Division of Quality Assurance, Safeguards, and Inspection Programs, Nuclear Regulatory Commission, June 21, 1983.

[62] Memorandum from Richard C. DeYoung, Director, Office of Inspection and Enforcement, Nuclear Regulatory Commission, to Ben B. Hayes, Director, Office of Investigations, Nuclear Regulatory Commission, June 21, 1983.

[63] Inquiry Team Report, *supra* note 60.

[64] *Id.*

[65] *Id.*

and determine whether LP & L or CE misrepresented the extent of CE compliance with the licensee's new QA program commitments." [66] A copy of the inquiry team's report was sent to a number of agency officials, including Ben B. Hayes, Director of NRC's Office of Investigations.

On July 27, 1983, Congressman Edward J. Markey, in a letter to Nunzio J. Palladino, Chairman of the NRC, informed Palladino that he was aware of the Commission's investigation of the Waterford plant and of the June 28, 1983 interview, including the individuals present and the subject of the interview. In view of the interview, Markey asked the Commission to respond to a number of questions concerning NRC's practice regarding investigation of matters raised by members of the news media. In addition, Markey requested a status report on the inquiry.[67]

On August 4, 1983, DeYoung forwarded a copy of the inquiry team's report to James M. Cain, President and Chief Executive Officer of Louisiana Power and Light, noting that he "believe[s] a meeting with [Cain] and other appropriate senior managers of Louisiana Power and Light is needed to discuss appropriate followup to these and other quality assurance concerns, which will need to be resolved prior to licensing for operation." [68] The report transmitted to the licensee contained the section discussing investigative matters, including the recommendation that the staff examine these matters and then refer the findings to the Office of Investigations for further consideration.

On September 8, 1983, the Commission forwarded the inquiry team report to Congressman Markey, in response to his earlier request for a status report on the investigation.[69]

On August 25, 1983, Frederick V. Lyon, an attorney with a Washington, D.C. law firm, requested five categories of information regarding the Waterford plant from Commission files (FOIA 83-508).[70] Upon reviewing the request, the NRC identified a memorandum from J.H. Sniezek to M. Peranich, entitled WATERFORD QA—ALLEGATIONS, as one of the documents covered by the request. The Joosten memorandum was attached to this document. On September 22, 1983, in a partial response to FOIA 83-508, the Commission advised Mr. Lyon that a copy of the Sniezek memorandum, with the Joosten memorandum attached, had been placed in the Commission's Public Document Room.[71] In the letter of transmittal forwarding this and other documents, the FOIA branch indicated to Mr. Lyon that the Commission would continue its search for documents and would contact him when the search was completed.[72]

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[66] *Id.*

[67] Letter from the Honorable Edward J. Markey, Chairman, Subcommittee on Oversight and Investigations, Committee on Interior and Insular Affairs, House of Representatives, to Nunzio J. Palladino, Chairman, Nuclear Regulatory Commission, July 27, 1987.

[68] Letter from Richard C. DeYoung, Director, Office of Inspection and Enforcement, Nuclear Regulatory Commission, to James M. Cain, President, and Chief Executive Officer, Louisiana Power and Light, Aug. 4, 1983.

[69] Letter from Nunzio J. Palladino, Chairman, Nuclear Regulatory Commission, to the Honorable Edward J. Markey, Chairman, Subcommittee on Oversight and Investigations, Committee on Interior and Insular Affairs, House of Represetnatives, Sept. 8, 1983.

[70] Letter from V. Frederick Lyon, Lyon and Kurz, to the Nuclear Regulatory Commission, Attn: Freedom of Information Officer, Aug. 25, 1983.

[71] Letter from J.M. Relton, Director, Division of Rules and Records, Office of Administration, Nuclear Regulatory Commission, to V. Frederick Lyon, Esquire, Lyon and Kurz, Sept. 22, 1983.

In subsequent communications involving this same FOIA request, the Joosten memorandum itself was identified. Again, the FOIA branch sought to determine whether the document should be withheld. On January 10, 1984, in a memorandum from the FOIA branch to Tom Combs of the Office of the Secretariat, the FOIA branch noted that the Office of Investigations had "no recommendation" regarding the disclosure of the Joosten memorandum.[73] On March 2, 1984, the Commission, in further response to FOIA 83-508, advised Lyon that the Joosten memorandum itself had been placed in the Public Document Room.[74]

Over a year later, in March of 1985, during the course of an investigation by the Commission's Office of Investigations (OI) involving the Waterford plant, an OI investigator, William J. Ward, found a copy of the Joosten memorandum in the personal files of the Vice President-Nuclear of Louisiana Power and Light, with notations from the office of Commissioner Thomas M. Roberts on the face of the document.

Attached to the Joosten memorandum was a second memorandum, dated June 15, 1983, from George E. White, Jr., Vice President, to Mr. John J. Cordaro (hereinafter referred to as "the White memorandum"). A copy of the White and Joosten memoranda follow:

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[72] *Id.*

[73] Memorandum from Donnie H. Grimsley, Acting Chief, Freedom of Information and Privacy Acts Branch, Nuclear Regulatory Commission, to Tom Combs, SECY, Nuclear Regulatory Commisison, Jan. 10, 1984.

[74] Letter from J.M. Felton, Director, Division of Rules and Records, Office of Administration, to V. Frederick Lyon, Esquire, Mar. 2, 1984.

MIDDLE SOUTH SERVICES, INC/BOX 61000/NEW ORLEANS, LA 70161/(504) 529-526

GEORGE E WHITE JR
VICE PRESIDENT

MEMORANDUM

June 15, 1983

CONFIDENTIAL

TO: Mr. John J. Cordaro

FROM: George E. White

RE: NRC Consideration of Waterford QA

Attached is a memorandum which I have received from sources inside the Nuclear Regulatory Commission regarding Waterford Quality Assurance matters. This memo is for your information but I would hope that you would limit its distribution to protect the source within the NRC.

GEW:pdb
cc: Mr. F. W. Lewis
Mr. F. G. Smith
Mr. J. M. Cain
Mr. W. Cavanaugh

(Dictated from Washington)

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555

OFFICE OF THE
COMMISSIONER

[illegible]
Waterford

June 8, 1983

33 JUN 9 A8:54

MEMORANDUM FOR: RICHARD C. DEYOUNG, DIRECTOR
OFFICE OF INSPECTION AND ENFORCEMENT

FROM: James K. Joosten, Technical Assistant
to Commissioner Gilinsky

SUBJECT: WATERFORD QA

Enclosed are copies of documentation which I have recently received from Mr. Ron Ridenhour, a free-lance reporter for Gambit Publications in New Orleans, concerning allegations of deficient QA practices at Waterford. Mr. James Taylor, from your office, has been following this issue since April 19, 1983, and has requested this information in order to more carefully focus his review and investigation into their substance. Since I had been the initial contact between Mr. Ridenhour and the NRC, I agreed to obtain this information for Mr. Taylor. However, at this point in time, I think it would be appropriate if your office took the lead, as was agreed in the April 19th meeting, and work with Mr. Ridenhour directly. I have discussed this with Mr. Ridenhour during our last few phone calls and have provided him with Mr. Taylor's phone number.

I would like to bring to your attention two specific items. First, Mr. Ridenhour is very concerned over new cracks in the containment basemat which were discovered on May 11, 1983, by the licensee and may have been withheld from NRC review. Secondly, Mr. Ridenhour has expressed concerns on several occasions, over the degree of objectivity of regional inspectors, who reviewed initial QA and basemat cracking issues. He appears to feel there is some evidence to suggest collusion with the licensee. In view of this, I would strongly suggest that appropriate measures be taken to assure an objective review to his allegations.

If there is anything further I can do, please let me know.

Enclosures:
As stated

cc: D. Garner
J. Milhoan
S. Chesnut
J. Austin
EDO
SECY

When Ward discovered the two memoranda in the LP&L files, with the marks from Commissioner Roberts' office on the Joosten memorandum, he "immediately recognized the importance of the documents" and brought them to the attention of Ben B. Hayes, Director of NRC's Office of Investigations, who was at the site at the time.[75] After Hayes examined the documents, it appeared to him that someone was improperly "tipping" the licensee of an ongoing NRC investigation of significant safety matters in a manner which could seriously hinder that investigation. Hayes was also concerned because the copy of the Joosten memorandum that was found in the utility's files contained indications on its face that suggested that it had come from a Commissioner's office.[76]

Upon returning to Washington, D.C., Hayes then met on the morning of March 13, 1985 with the then-Chairman of the NRC, Nunzio J. Palladino, and the Chairman's Executive Assistant, Norman Haller, in Washington, D.C. to discuss the matter.[77] Palladino asked Hayes several questions about the circumstances surrounding the discovery of the document. He also asked whether Hayes had discussed the matter with Roberts. Hayes answered that he had not. Palladino asked for Hayes' recommendation on how to handle the matter and, in response, Hayes indicated that he thought the matter should be referred to the Commission's Office of Inspector and Auditor (OIA).[78]

Following Hayes' meeting with Palladino and Haller, Palladino, Haller, and Palladino's legal assistant, William Reamer, met with Roberts and his legal assistant, James M. Cutchin, in Roberts' office on the afternoon of March 13, 1985. At this meeting, Palladino brought the matter to Roberts' attention and they discussed the appropriate way to handle this matter.[79]

Immediately following the meeting with Palladino, Roberts held a meeting at approximately 4:00 p.m. with his staff to discuss the memoranda found in LP & L's files and to discuss what course of action should be taken with respect to this matter.[80]

The meeting was recorded. Following is a transcript of the March 13, 1985 meeting:

> ROBERTS. Katherine Powell, Maria-Lopez Otin, James M. Cutchin IV, Steve Chesnut. It's 4:00. About five minutes ago, Chairman Palladino came into my office and told me that late morning today, Ben Hayes handed him and Norm Haller three pieces of paper which apparently Hayes' people came upon in the course of their Waterford investigation. Now the first is a memorandum on Middle South Services Inc. letterhead, George E. White Jr. Vice-President, dated June 15, 1983. Confidential. To Mr. James A. Cordaro, from George E. White. RE: NRC consideration

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[75] Hearing before the Committee on Governmental Affairs, United States Senate, "Need for an Inspector General at the Nuclear Regulatory Commisison", Apr. 9, 1987, p. 37 (hereinafter referred to as "the Glenn hearing").

[76] *Id.*, p. 38.

[77] *Id.*, p. 38.

[78] *Id.*

[79] Tape recording of a meeting on Mar. 13, 1985 between Commissioner Thomas M. Roberts and his staff, provided to Subcommittee investigator by Commissioner Roberts' attorney, Terrence O'Donnell.

[80] *Id.*

of Waterford QA. Attached is a memorandum which I have received from sources inside the Nuclear Regulatory Commission regarding Waterford quality assurance matters. This memo is for your information, though I would hope that you would limit its distribution to protect the source within the NRC. Carbon copies are indicated to Mr. F. W. Lewis, FYI, that's Floyd Lewis, who is Chairman of the holding company, Mr. F. G. Smith, I do not know Mr. Smith, Mr. J. M. Cain, who is President of Louisiana Power and Light, Mr. W. Cavanaugh, who I guess is President of Mississippi Power and Light, but came from . . .

CHESNUT. . . . ANO . . .

CUTCHIN. . . . Arkansas Nuclear, but at one time he was . . . but, originally he was Arkansas . . .

ROBERTS. O.K. Now that's the memorandum. Confidential. The attachment is on the letterhead of the United States Nuclear Regulatory Commission Office of the Commissioner. This is a memorandum dated June 8, 1983. For Dick DeYoung, Director, Office of Inspection and Enforcement, from James K. Joosten, technical assistant. And this has to do, and there is an attachment that is a letter from Gambit to Jim Joosten. Now, the troubling thing to me is and Palladino, I guess he's asking me what do I want him to do with this. The copy that I am looking at is a copy of this office's copy of the Joosten memorandum.

OTIN. This office? Our office?

ROBERTS. Yes. And its got checked here, you know, it was from Joosten to DeYoung and carbon copy to Dan Garner, J. Milhoan, S. Chesnut, J. Austin, EDO, and SECY. But this copy is . . .

OTIN. So, the implication is that it would be us?

ROBERTS. Absolutely . . . no other thing . . . what else could it be? Also, in the upper right hand corner it has SC dash TR and although it's indistinct, I think that is my badly scrawled initials, TMR. Now, obviously, to me, the implication is that there's a direct pipeline from me to George E. White. Who the hell is White? Is he that little blonde guy, he's about 5′2″? I don't know how to react to this, because I certainly—I have never discussed Waterford with George White. I don't think I've ever exchanged over two words with George White. I have met him.

OTIN. . . . but that's it . . .

ROBERTS. . . . I see him sitting in the back of the room when we have congressional hearings . . .

OTIN. Yeah, we don't even talk to him.

[Unintelligible.]

CHESNUT. I've met White, but I don't . . .

ROBERTS. Well, how could anyone . . .

OTIN. Could we track ours in our files to see if it's still there?

ROBERTS. Sure . . . is Pat the right one? [unintelligible] Pat, could you step in here please?

[Unintelligible.]

ROBERTS. Betcha—paranoia's coming out.

[Unintelligible.]

Chesnut. I have met George White and he came in this office one day with a group of people and I don't recall ever . . .

Otin. Could he have taken it?

Chesnut. I don't know. We may have discussed it. I don't know. I don't recall.

Roberts. Well, let me ask you an important question, Steve. Did you give that document to George White?

Chesnut. I have no idea. I don't recall ever doing it. I really don't. I . . .

Roberts. Well, I mean I sure as hell didn't. That's not at issue. I hope not.

[Unintelligible.]

[**Unident**]. I can tell you I didn't, because I don't know who George White is.

Cutchin. I've never seen it before.

Chesnut. I will say, I have met George White, but I don't recall doing it. But, uh, I really don't.

Roberts. It's clear to me that that is, I think that's this office's copy. I don't think that's . . .

Chesnut. I think it is . . . I mean if it . . . it's a xerox of our office copy . . . it's not . . .

[Unintelligible.]

Cutchin. Even if we had given it to him . . .

Roberts. . . . which I'm not prepared to say we did. I certainly didn't.

Cutchin. I'm just saying even if we had, it's not limited distribution. My first reading of it doesn't make clear to me that there's anything in there that would put them on notice . . .

Otin. . . . except for the implication, though. We may be legally right . . .

Cutchin. Oh yes, I agree.

Otin. . . . but the implication just doesn't look good if there is, like you say, a pipeline . . .

Cutchin. Sure, sure.

Otin. . . . and I am sure Tom has never encouraged that, let's not . . .

Cutchin. . . . not only not encouraged it, he would have discouraged it. That's the first time I've ever seen it . . . that's the original?

[**Unident**]. That's our copy.

Cutchin. Is there anything different?

Otin. That's what I'm trying to check, I mean because somebody could have . . . no, it is.

[Unintelligible.]

Chesnut. It looks like the same one . . .

Cutchin. Well, I'll tell you, if I had given somebody a copy, I would have sure deleted all of the incriminating information so, I am inclined to think that if anybody did it, it was a clean copy [laughing].

Roberts. Well, I will have to say I am astounded . . . I don't see how this . . . Now Palladino wants to know what do I want him to do. His inclination is to turn it over to OIA.

CUTCHIN. For what? What is the violation?

ROBERTS. Beats me. I don't know.

CUTCHIN. I mean, what is the violation, because that was my whole point a few minutes ago. Even if it were true, it is your matter to deal with personally. There has been no violation.

[Unintelligible.]

CUTCHIN. I don't see that even if . . .

OTIN. . . . it needs to go out of the office as far as . . .

CUTCHIN. . . . yes, it's a matter for you to deal with personally, even if it was . . .

OTIN. . . . even if it was a member of the office. Obviously there was no ill intent in all of the [unintell.] of whats left . . . It may have been just . . .

CUTCHIN. And there's nothing on that to indicate that a copy of that office . . . that a copy of that memo couldn't have properly be leaked.

OTIN. I think that you really [unintelligible] tell us for the record that . . .

POWELL. Wait a minute, wait a minute, could that have ever been FOIA'ed for any reason and they got our copy of it?

CUTCHIN. That's a good question.

ROBERTS. That's an excellent question. How can we track that?

POWELL. Would Eugenia know what is . . .

[Unintelliginble.]

CHESNUT. I would . . . from the document room . . . still the point is . . .

ROBERTS. I wonder if . . . now wait a minute, that's, now wait a minute, now . . . now that's an excellent . . . Kath, how can we find out if . . .

POWELL. We might . . . let me ask Patty . . . we keep a record . . .

OTIN. [Unintelligible] used to keep a record. Now I think it [unintelligible] that Tom call.

CUTCHIN. We keep records of our own FOIA responses, too. I'm pretty sure, 'cause I know when I make a FOIA response, I make copies for us to keep.

[Unintelligible.]

CHESNUT. It sounds like, though that . . . you know . . . with the letter that was attached to it . . . if it was something that was FOIA'ed . . .

OTIN. . . . they didn't have to protect any sources . . .

CHESNUT. . . . they didn't have to protect any sources . . . All I can say is I don't recall doing it but I remember after a meeting that George White was in here with a bunch of LP & L people . . . I mean, I have talked to George White in the past . . . I don't recall ever doing that, but I . . . I can't tell you absolutely, positively that I didn't. I really can't. And I'm being perfectly honest with you. . . . Let me read the letter again.

Cutchin. I don't recall, uh, recall ever giving George documents of any sort.

Chestnut. [Unintelligible] I don't recall doing that, but . . .

Cutchin. I'm not yet convinced that there is anything there for OIA to get involved. Because absent some marking on the document, whether it's a limited distribution document, especially since it's addressed to DeYoung, which is outside the Commission offices and has cc's on there to EDO and SECY, it is not the kind of document . . .

Otin. . . . it is not a Commission controlled document.

Cutchin. . . . that is a controlled document. So, if it were available outside the office, regardless of its source, it's not necessarily . . . it's not obvious that it's a violation of anything that OIA should be involved, meaning rising to the level of wrongdoing of some sort.

Powell. . . . we keep it for a year, our information for a year. But wait a minute . . . it's over in SECY, do you have any reason for Pat not to go over there and look through . . .

Roberts. No.

[Unintelligible.]

Chesnut. I don't recall Tom. I honestly don't. Maybe you ought to ask who wrote the letter.

[Unintelligible.]

Cutchin. All he is saying is that that letter is one that Ben Hayes ran across in the file. Now why in the hell are we looking . . .

[Unintelligible.]

Cutchin. . . . the implication is that from George White's memorandum, though, that he got something that maybe he shouldn't have gotten.

[Unintelligible.]

Otin. . . . to protect his source.

Cutchin. . . . and to protect his source.

Roberts. The implication is I am the source.

Chesnut. . . . well, I don't recall, Tom, but . . .

Cutchin. The memo was seven days old when this was written. Because the memorandum is dated June 8th and the date on George White's memorandum is June 15. So that is seven days.

Powell. Well, wait a minute Steve, to help you, when did you go out of town that year? Did you go out of town then, were you in the mountains then?

Cutchin. See, it's dictated from Washington . . . and so he had to have gotten it . . . in the seven day time period.

Chesnut. At least my initial's on it there—SC to TR—obviously, I saw the thing . . .

Cutchin. No, that's not the point.

Otin. That's not what she's saying.

Chesnut. So I mean . . .

Cutchin. It went from you to Tom to Waterford . . .

Chesnut. I didn't date when I signed it and he didn't date it when he got it, so you can't really. . . .

Cutchin. Well we didn't get it until, uh, June 9.

Roberts. Well, we got it June 9.

Cutchin. . . . so there was a six day time frame there. Assuming he even dictated his letter and this is Cavanaugh's copy, so . . . [unintelligible] [reading from the Joosten memorandum] I have received from a free lance reporter from Gambit concerning allegations of deficent QA practices.

Chesnut. Is it a paper, or is it . . . ?

Cutchin. It's a letter from this Ridenhour reporter to Jim Joosten, enclosed are copies of everything I have written dealing specifically with QA problems. Also copies of most of the documents we have detailing the problems with cracks in the common foundation.

Otin. Is that what Joosten's letter said or is that what Gambit said?

Cutchin. That's the incoming Gambit letter and Joosten just forwards the letter. They're talking about concerns about the degree of objectivity of regional inspectors who reviewed initial QA and basemat cracking issues.

Powell. Steve, could you . . . could somebody have said could I have a copy of your copy? That's happened before, too. I can't find my copy . . . can we . . .

Roberts. You mean Garner might have passed him in the hall and said, "Hey, I need a copy of that?"

Powell. . . . and I can't locate, can I . . . do you have a copy I . . .

Chesnut. That could have happened. I don't know . . . I honestly don't recall.

Powell. Well, I'm trying to jog your memory, because that can happen. We're given other people copies of stuff we've gotten in here. We've gotten their copies before.

Roberts. Well, I've got house quests . . .

Otin. Let us track down the FOIA . . .

Cutchin. Yeah, but I think before the Chairman initiates anything with OIA . . .

Roberts. I'm going to ask the Chairman not to do anything until . . .

Cutchin. . . . you decide what you what to do about it.

Otin. Turn that off.

Powell. Tom, you might want to tell him that there are several . . .

Roberts. End of meeting.

* * * * *

At that point, the recorded meeting concluded and the tape recorder was turned off. [When interviewed by Subcommittee investigators, Roberts indicated that this was the only tape recording he ever recalled making of a meeting and he did not know why he decided to make one in this case.[81]]

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[81] Interview of Commissioner Thomas M. Roberts by Jon Barker and Jack Bagnulo, Subcommittee Investigators, Aug. 25, 1987 and Sept. 30, 1987.

Roberts indicated that following the recorded meeting, he and Palladino again discussed the fact that the Joosten and White memoranda had been discovered at LP & L by an OI investigator.[82] As a result of this discussion, Roberts told Palladino "fine, send Mr. Hayes and the person who found it over to my office, and let's talk about it." [83]

The next day, March 14, Palladino sent a memorandum to Hayes in which he advised him as follows:

> With regard to the June 15, 1983 memo from George E. White to John J. Cordaro, I discussed this matter with Commissioner Roberts. Since, under the Reorganization Plan of 1980, supervision of personnel within the immediate office of each member of the Commission is that Commissioner's responsibility, Commissioner Roberts believes (and I concur) that this is a matter for him to deal with. Therefore, you should discuss it with him as soon as possible. I have given Commissioner Roberts the two copies of the June 15, 1983 memorandum that you left with me.[84]

Accordingly, Ben Hayes and William Ward, the OI investigator who had discovered the memoranda in the LP & L files, met with Roberts and Roberts' legal assistant, Cutchin, in Roberts' office on March 15, 1985.[85] According to Hayes:

> Commissioner Roberts indicated that he had inquired into the matter, talked to all members of his staff, and was convinced that no one on his staff had sent the document. He suggested that the documents have been obtained by janitorial personnel, or perhaps part-time help that had been working in his office.[86]

Roberts indicated to Hayes that "[he] was confident that no one on [his] staff had leaked it, or that certainly [he] hadn't leaked it.[87]

Roberts did not ask White how he had obtained the Joosten memorandum, explaining that he did not believe that he had jurisdiction over White.[88] Roberts did explain that he had lunch with White and the new Chairman of Middle South Utilities, Inc. (of which LP & L is a subsidiary) on April 9, 1986, but, according to both Roberts [89] and White,[90] the subject of the Joosten memorandum was not discussed.

On August 5, 1987, Steve Chesnut was interviewed by investigators from the Subcommittee.[91] During the course of the interview,

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[82] Hearing before the Subcommittee on Nuclear Regulation of the Committee on Environment and Public Works, June 3, 1987 (unpublished transcript) (hereinafter referred to as "the Breaux Hearing").

[83] *Id.*, p. 16.

[84] Memorandum from Nunzio J. Palladino, Chairman, Nuclear Regulatory Commission, to Ben. B. Hayes, Director, Office of Investigation, Nuclear Regulatory Commission, Mar. 14, 1985.

[85] Glenn Hearing, p. 38.

[86] Glenn Hearing, p. 39.

[87] Breaux Hearing, p. 17.

[88] Glenn Hearing, p. 15

[89] Glenn Hearing, p. 15.

[90] Affidavit of George E. White, Jr., Mar. 30, 1987.

[91] Interview of Steve Chesnut by Jon Barker, Subcommittee Investigator, Aug. 5, 1987.

Chesnut indicated that he did know George White, that he had met him on a couple of occasions, but that he did not regularly deal with him because White was principally involved in congresdsional affairs, not the type of technical issues that Chesnut was involved in. Chesnut indicated that another individual in Commissioner Robert's office, Maria Lopez-Otin, handled congressional affairs for the Commissioner. Chesnut indicated that he did not release the document to George White.

With respect to the events surrounding the March, 1985 discovery of the Joosten memorandum in LP & L files, Chesnut indicated that during one day in that month (Chesnut could not recall the precise date of March 13, 1985), at about midday, Commissioner Roberts had called him into his office and asked several direct questions as to what Chesnut knew about the document and how it might have gotten into the utility files. At that time, Chesnut recalled telling the Commissioner that he had not given the document to George White or any other person outside of the Commission and that he was unaware of whether anyone else in the office might have done so. Chesnut indicated that Roberts was clearly serious during the course of this interview and that he, Chesnut, felt that Commissioner Roberts was making a sincere effort to discover whether he, Chesnut, had released the document.

Chesnut also indicated that later that same day, by which time Chesnut presumed Commissioner Roberts had individually interviewed everyone else on the staff, a meeting attended by all of Commissioner Roberts' principal staffers was held. At that time, Chesnut recalled the Commissioner telling the staff that based upon these interviews, he did not believe that anyone in his office had released the document, but that he, Roberts, did not tolerate that type of activity and wanted everyone on the staff to understand that. Mr. Chesnut indicated that in this meeting Commissioner Roberts essentially lectured the staff.

George E. White, Jr., in an affidavit dated March 30, 1987,[92] has indicated the following about the release of the Joosten memorandum:

> I, George E. White, Jr., Vice President, MSU System Services, Inc. (SSI), having been duly sworn, assert that the following is true and correct, to the best of my recollection:
>
> 1. I do not recall at any time having had in my possession internal NRC documents or information regarding the Grand Gulf or Waterford nuclear plants which would not have been provided or left for SSI or made available for the public in the normal course of business.
>
> 2. I do not recall having ever received internal NRC documents or information (as described in paragraph 1) from NRC Commissioner Tom Roberts or any other NRC Commissioner, from anyone in the office of an NRC Commissioner, or from any other person.

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[92] Affidavit of George E. White, Jr., Mar. 30, 1987.

3. I do not recall ever having had any internal NRC documents or information (as described in paragraph 1) fall into my hands from a source I could not identify.

4. If I received any internal NRC documents or information (as described in paragraph 1) from any source, I would consider that to be an unusual event.

5. I do not recall that I ever had or heard of a source for internal NRC documents or information (as described in paragraph 1) within the NRC, and I do not consider anyone now or formerly employed by the NRC to be a source for such documents or information.

6. On March 18, 1987, I met with Steve Ryan, Counsel for the Senate Governmental Affairs Committee. Mr. Ryan showed me a copy of a memorandum from myself to John Cordaro, Senior Vice President-External Affairs for Louisiana Power & Light Company, dated June 15, 1983, with carbon copies sent Floyd Lewis, the Chairman and CEO of Middle South Utilities, Inc.; Frank Smith, then President of Middle South Services, Inc.; Jim Cain, President of Louisiana Power & Light Company; and Bill Cavanaugh, the Senior Vice President-Nuclear Operations for Louisiana Power & Light Company. The memo, which has been dictated from Washington and actually signed by my secretary, Peggy Balsamo, in New Orleans attached what appears to be a copy of a memorandum dated June 8, 1983 from James Joosten, Technical Assistant to Commissioner Gilinsky, to Richard deYoung transmitting a letter received from Ron Ridenhour of Gambit Publications. The memo by Mr. Joosten refers to allegations Mr. Ridenhour makes in his letter regarding new cracks in the Waterford III containment basement which "may have been withheld from NRC review" and other possible QA/AC problems at Waterford III. My memorandum to Mr. Cordaro was marked 'Confidential' and requested that its dissemination be restricted to protect the source within the NRC. These were not the type of memoranda I was accustomed to sending or receiving.

7. Although I do not doubt the authenticity of the aforementioned June 15, 1983 memorandum, and feel that I must have seen the attachments thereto, I have no recollection of preparing or dictating that memorandum or of receiving the attachments thereto, either through a Freedom of Information Act request or otherwise. I do not recall drafting or dictating any memorandum to any personnel affiliated with Middle South Utilities or any of its subsidiaries concerning internal NRC documents or information (as described in paragraph 1) regarding the Grand Gulf or Waterford Nuclear plants.

> 8. I have instructed my secretary to search my files for any memoranda as described on paragraph 6 or 7. No such memoranda have been found to date. However, we have noted that some of my files for 1983, 1984 and 1985 have not been located. On March 27, 1987 John Cordaro informed me that he had located in his files a copy of my June 15, 1983 memo, together with attachments. Attached to this affidavit is a copy which Mr. Cordaro has provided to me.
>
> 9. The copy of the June 8, 1983 Joosten to deYoung memorandum which was attached to my June 15, 1983 memo to John Cordaro showed copies sent to a number of people, including D. Garner, J. Milhoan, S. Chesnut, and J. Austin. A check mark was shown near Chesnut's name. Until Mr. Ryan told me that S. Chesnut was an Assistant to Commissioner Roberts, I did not recall that he was affiliated with that office. I do now know D. Garner or J. Milhoan. I know J. Austin to be an Assistant to Commissioner Asselstine.
>
> 10. On April 9, 1986, I met with Commissioner Roberts for lunch to introduce him to the new Chairman of Middle South Utilities, Inc. None of the matters mentioned above were discussed at this meeting, nor has anyone from the NRC ever contacted me concerning any of these matters.

On June 22, 1987, George White was interviewed by investigators from the Subcommittee.[93] During the course of that interview, White indicated that he stood by the contents of the affadavit he gave to staff of the Governmental Affairs Committee, and elaborated on the following points:

(1) White believed that the document in question had been sent by express mail to Louisiana Power and Light Offices from Washington. Mr. White produced a carbon copy of an Express Mail receipt dated June 14, 1983, which he indicated was, to the best of his recollection, the receipt reflecting the transmission of the document from Washington to LP & L offices.

(2) The receipt produced by Mr. White indicated that the document was sent to his office from B. Lemond at the Edison Electric Institute (a trade association in Washington). White identified B. Lemond as Betsy Lemond, then a member of the EEI staff. White indicated that Ms. Lemond would have had no knowledge of the contents of the mailing and that he would have used her name merely as the return addressee;

(3) White indicated that it was usual for him to send documents in this manner, although he further indicated that he would usually only express mail those documents that he felt were somewhat urgent;

(4) White indicated that the cover memo had been dictated to his Secretary and that he sent "tons of things" from Washington in this manner. He further indicated, however, that it was

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[93] Interview of George E. White, Jr., by Jon Barker and Jack Bagnulo, Subcommittee Investigators, June 22, 1987.

not usual for him to write memos with the tone of this cover memo, but attributed this to "pufferry" on his part, trying to impress his supervisors with the fact that he had "sources" within the NRC;

(5) White concluded his discussion of the document by noting that, in his opinion, it was not of a type that would give the licensee any advantage, because it contained no information that had not been reported by GAMBIT in previous articles.

White further indicated that he had met Steve Chesnut four or five times at various industry receptions and that he was familiar with him from Commission hearings where Chesnut would accompany Commissioner Roberts. He indicated, however, that he was not sure if he would recognize Chesnut if he ran into him when he was alone.

Finally, as White was closing the interview, he indicated that he used to get a lot of documents from other members of the Washington lobby community. He indicated that he did not believe he got the documents from Commissioner Roberts, but could not rule that out. He also suggested that the Subcommittee investigators talk to King Mallory, who White indicated was a former official at LP & L and a close friend of Commissioner Roberts.

In response to White's suggestion to talk to Mallory, investigators for the Subcommittee interviewed Mallory.[94] As a result of this interview, no significant information was obtained.

Roberts, during an appearance before the Subcommittee, was subsequently asked about his efforts to determine how the document was released from his office:

> Senator SIMPSON. Mr. Roberts, do you think that you have explained for the record with enough completeness—and I just ask this, because I would inquire—the steps that you took to determine whether the document that is at issue here was released from someone in your office? You wanted to find that out, didn't you.
>
> Mr. ROBERTS. I certainly did.
>
> Senator SIMPSON. And what steps—I mean, were they the most thorough steps that you can imagine within your province to do at that time?
>
> Mr. ROBERTS. Well, this is a serious matter and I certainly don't mean to be facetious, but with hindsight I perhaps would have done things a little differently. But at that time, considering the "seriousness of the matter," the content of the memorandum that apparently was leaked, the passage of time, I thought at that time I sufficiently satisfied myself that it had not originated from my office. And I will say, I was perplexed by the whole thing. To answer your question, at that time when it was brought to my attention, I believed that I made sufficient inquiry into the matter and I satisfied myself. I trusted my staff. I believed them. They vehemently denied any knowledge of this

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[94] Interview of King Mallory by Jon Barker and Jack Bagnulo, Subcommittee Investigators, Sept. 9, 1987.

> matter, and as far as I was concerned, I had made sufficient inquiry.
>
> Senator SIMPSON. At least at that time it was sufficient in your mind that you had done all you could to determine that?
>
> Mr. ROBERTS. That's correct. And I would amplify that by saying that I didn't do all of this in a vacuum. I told Mr. Hayes that I was not pursuing it, and I told each of the other Commissioners and Chairman Palladino.
>
> Senator SIMPSON. All right. . . .[95]

* * * * *

Following the discussion of the incident in the meeting between Hayes and Roberts, Roberts then asked Hayes why he did not personally bring the matter to Roberts' attention first. Hayes replied that he thought his first obligation was to notify the Chairman.[96]

At the conclusion of Hayes' meeting with Roberts, Roberts then asked Hayes to send him all copies of the documents in the OI files. After Hayes advised Roberts that he had also taken notes during his prior discussion with Palladino, Roberts stated that he wanted the notes as well. Hayes complied with Roberts' instructions.[97]

Roberts explained the rationale for requesting all of Hayes' documents and notes:

> I considered this a matter that related to me. The Chairman had made that determination, and I agreed with his determination, and I wanted Mr. Hayes' file on the matter to have a complete record. And quite frankly, I was apprehensive about an unauthorized leak to the press or to any special interest group in a manner that this information could be used unfairly to bring discredit upon me or upon my staff.[98]

The Palladino memorandum to Hayes indicated that Roberts would deliver copies of it to the other Commissioners. Roberts did in fact hand deliver copies to the other Commissioners.[99] When so doing, Roberts testified that he explained the circumstances surrounding the memorandum to each. He told them that he had interrogated his staff and was convinced that the leak had not originated in his office and that he did not intend to pursue the matter further:

> I subsequently met with every Commissioner, explained the subject as I understood it, told them precisely what I had done, and then destroyed those documents; that is correct.
>
> And then no Commissioner with whom I met, of whom several are at this table, voiced any objection or any uncomfortableness with what I was doing.[100]

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[95] Breaux Hearing, pp. 25–6.
[96] Glenn Hearing, p. 39.
[97] *Id.*
[98] Breaux Hearing, p. 19.
[99] Glenn Hearing, p. 14.
[100] *Id.*

The other Commissioners, when interviewed by the Subcommittee, confirmed Roberts' account of these events.[101]

Significantly, the matter was never referred to the Commission's Office of Inspector and Auditor.

Following his meetings with the other Commissioners, Roberts indicated that he destroyed the documents pertaining to the matter.[102] [In testimony before the Subcommittee on June 9, 1987, Roberts testified that he did not inform the other Commissioners that he was going to destroy the documents.[103]]

Roberts was asked about the destruction of the documents:

> Chairman GLENN. What was your reason for asking that all of the documents, all the complete record of this be destroyed?
>
> Mr. ROBERTS. I saw no reason for them to continue to exist. I certainly had not leaked those documents. I could not find anybody in my staff that would give me any thought they had.
>
> Chairman GLENN. But was there a reason to destroy them?
>
> Mr. ROBERTS. At the time I thought that was the appropriate thing to do.
>
> Chairman GLENN. Why?
>
> Mr. ROBERTS. I admit to being somewhat paranoid. I thought somebody was trying to set me up.
>
> Chairman GLENN. Who?
>
> Mr. ROBERTS. I had no idea. I would re-emphasize the fact that I told every one of the Commissioners precisely what I was doing. No one voiced any objection.
>
> Chairman GLENN. Were those documents all destroyed then at that time?
>
> Mr. ROBERTS. The documents that I had were all torn up and thrown in the wastebasket. . . .
>
> I thought that I was being improperly and unfairly attacked by innuendo, that my office was passing out documents over the transom to a licensee, which is absolutely incorrect.[104]

On June 3, 1987, in testimony before the Subcommittee, Roberts stated with respect to his earlier testimony of April 9:

> My testimony before Senator Glenn was inaccurate to the extent that I said I destroyed all the documents. That is not correct; I did not destroy all the documents . . . I didn't destroy the documents I got from [the Director, OI]. I put them in the well of a desk drawer at my personal desk and I had forgotten I had done that.[105]

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[101] Interview of James K. Asselstine by Jon Barker and Jack Bagnulo, Subcommittee investigators, June 9, 1987 and June 12, 1987; interview of Frederick M. Bernthal by Jon Barker and Jack Bagnulo, Aug. 10, 1987; interview of Kenneth M. Carr by Jack Bagnulo, Sept. 10, 1987; and interview of Lando W. Zech, Jr., by Jon Barker and Jack Bagnulo, Oct. 11, 1987.

[102] Glenn Hearing, p. 14.

[103] Breaux Hearing, pp. 24, 31.

[104] Glenn Hearing, p. 14.

[105] Breaux Hearing, pp. 23, 26.

On April 9, 1987, the propriety of the apparent release of the Joosten memorandum from Commissioner Roberts' office was discussed at a hearing on that date before the Committee on Governmental Affairs of the United States Senate.[106] At that hearing, Hayes testified as follows:

> I felt that the document indicated that the Middle South, the holding company for LP & L, had a source directly inside NRC, especially inasmuch as the document came from the files of Commissioner Roberts. Particularly startling was the fact that the document was received in Commissioner Roberts' office on Thursday, June 9, 1983, and was transmitted by Mr. White of LP & L only four working days later, June 15 of 1983. The memorandum was important as it dealt with a base mat issue which was under active review by the NRC staff, and that it reports collusion with the licensee on the part of an NRC personnel, a very serious allegation in my opinion. The document also notes that LP & L may have withheld information on the base mat cracks from the NRC. OI subsequently initiated an investigation of that matter. For a licensee to know that the NRC was discussing the issue of possible collusion, and the base mat issue, would give them a tremendous advantage. This is an example of someone within the NRC, of tipping a licensee of a potential investigation.[107]

In response to questions about the apparent release of the document from his office, Commissioner Roberts testified at the April 9, 1987 hearing as follows:

> I have absolutely no idea [who the 'source' is that is mentioned in Mr. White's document]. I endeavored to find out if it was in fact anybody in my office, and as best I could determine, it did not originate from my office. It obviously is a copy of a document that was in my office. I do not believe the copy was given by anyone on my staff, and certainly not by me, to anyone outside the office.[108]

Under further questioning at the April 9 hearing regarding his decision to investigate this matter himself, rather than turn it over to the Commission's Office of Inspector and Auditor, Roberts stated that he and Palladino did not discuss referring the case to OIA.

> [Palladino] called me up and said he had a matter that had been brought to his attention and I needed to talk to Ben Hayes about it. And I said fine, send Hayes around. I do not think we specifically discussed whether it should be referred to OIA.[109]

Roberts had a different explanation regarding how the decision with regard to whether OIA should investigate this matter was reached when he appeared before the Subcommittee:

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[106] Glenn Hearing.
[107] Glenn Hearing, pp. 37-38.
[108] Glenn Hearing, p. 13.
[109] Glenn Hearing, p. 13.

Senator **Breaux**. Now, you had just said, I think, in your testimony about Chairman Palladino's role in how this process was going to be investigated, and in your letter of May 6th, 1987 to Members of the House of Representatives who had previously written to you requesting your resignation, you indicated that Chairman Palladino, subsequent to your conversations with him on March 13th or 14th of 1985, "made an express and written determination that pursuant to the Reorganization Act of 1980, the responsibility for dealing with it apparently rested with my office." This implies to me—and I think it just said that to the Committee, too—that Chairman Palladino on his own initiative made this determination. Is that your understanding?

Mr. **Roberts**. My inclination is to say yes, but we may have—he and I and each of our legal assistants may have discussed that matter. I cannot recall precisely.

Senator **Breaux**. I'm trying to get to the point of who decided that the matter to be investigated concerning the leak, perhaps from your office, rested with your office to investigate it. The memorandum to Mr. Ben Hayes from Chairman Palladino says in part that "Commissioner Roberts believes, and I concur, that this is a matter for him to deal with."

The point I'm trying to make is, where did the concept of who was to investigate it come from? Did it come from yourself, and then Mr. Palladino concurred with it, as his memorandum says? Or was he mistaken when he put this out in a memorandum to Ben Hayes?

Mr. **Roberts**. I cannot recall exactly, but it's my recollection that the Chairman and I and each of our legal assistants met to discuss the proper jurisdiction. If you asked the question of who made the ultimate determination, it was the Chairman.

Senator **Breaux**. Did you suggest to the Chairman in conversation——

Mr. **Roberts**. I may or may not have. I don't recall.

Senator **Breaux**. My question is, did you sit with the Chairman or converse to him any kind of a statement that could have indicated, look, I'll check into this; I'll look into it; don't worry about it; I'll handle the investigation of it?

Mr. **Roberts**. I wouldn't characterize it in that way. He called me in and said, here, we have this possible problem, and how do we deal with it?

Senator **Breaux**. You think you said what to that question from Mr. Palladino?

Mr. **Roberts**. I think I consulted with my legal assistant.

Senator **Breaux**. And what would you have conveyed back to him? I'm just trying to find out——

Mr. **Roberts**. Well, we were all in a group. It was the four of us, and I think the Chairman's Executive Assistant, Norm Haller, was there also. And it was more of an

> atmosphere of, well, here we have this, how do we handle it?[110]

* * * * *

At the Subcommittee's hearing on June 3, the Subcommittee learned that on March 18, 1985, the New Orleans Times-Picayune filed a FOIA request with the Commission (FOIA 85-184) asking for:

> [A]ll correspondence, memoranda, reports, studies, and other documents that have been generated from Office of Investigations' investigations, or reviews of matters concerning Waterford 3 Nuclear Plant at Taft, La., owned by Louisiana Power and Light Co.[111]

On March 28, 1985, just over two weeks after Roberts had spoken with Palladino, interviewed his staff, and met with Hayes about this matter, Tom Combs, Chief of NRC's Correspondence and Records Branch sent a memorandum to several persons including Roberts' legal assistant, Cutchin.[112] The subject of the memorandum was the FOIA request 85-184. The memorandum stated:

> Attached is the subject request. Please search your office files and forward any documents subject to the request, except those originated in another Commissioner or staff office, by COB April 2nd, 1985. Any recommendation to withhold should be coordinated with the Office of General Counsel.[113]

In a notation on the Combs memorandum, next to Cutchin's name, is a handwritten note, dated April 1, indicating "no documents."[114]

Senator Breaux questioned Roberts about this FOIA request, beginning with a line of questioning focusing on whether Roberts' legal assistant James Cutchin, was aware of the origin of the Joosten document:[115]

> Senator BREAUX. Do you remember if the White memo was discussed at the [March 15th] meeting with Mr. Hayes and Mr. Ward?
>
> Mr. ROBERTS. Yes.
>
> Senator BREAUX. Prior to the meeting had you discussed or shown the White memo to Mr. Cutchin?
>
> Mr. ROBERTS. As best I can recall, Chairman Palladino gave me the White memo on the 13th of March, and that afternoon I called my office in and showed them the White memo and interrogated them, if they had any knowledge of this incident.

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[110] Breaux Hearing, pp. 20-22.

[111] Letter from Lynn Cunningham, The Times-Picayune Publishing Corporation, to Joseph Felton, Director, Division of Rules and Records, U.S. Nuclear Regulatory Commission, Mar. 18, 1985.

[112] Memorandum from Tom Combs, Chief, Correspondence and Records Branch, Nuclear Regulatory Commission, to Bill Reamer, Mac Cutchin, Pat Davis, Steve Sohinki, and William Parler, Mar. 28, 1985.

[113] *Id.*

[114] *Id.*

[115] Breaux hearing.

Senator **Breaux**. So Mr. Cutchin would have known about it? You had shown it to him, I take it, prior to the meeting with Mr. Hayes?

Mr. **Roberts**. To the best of my recollection, yes.

Senator **Breaux**. You remember discussing it with Mr. Cutchin at some point, don't you, the White memo?

Mr. **Roberts**. I discussed it with everybody on my staff.

Senator **Breaux**. And Mr. Cutchin was on your staff during that time?

Mr. **Roberts**. Yes. Yes, sir.

Senator **Breaux**. Was the White memo originally found by Mr. Ward of the Office of Investigations?

Mr. **Roberts**. That is my understanding.

Senator **Breaux**. Did Mr. Ward find the memo, to your knowledge, during the course of the Office of Inspections [sic] investigation of the Waterford facility?

Mr. **Roberts**. As I recall, Mr. Ward said he was at the plant site, and an employee of the utility said, here's the file; have at it; go through it; look at anything you want. And as I recall, Mr. Ward said that's where he found the White memo.

Senator **Breaux**. What was Mr. Ward doing at the Waterford facility, do you know?

Mr. **Roberts**. I don't know precisely, but I think he must have been conducting some sort of investigation. That's his job.

Senator **Breaux**. After he obtained the White memo at the Waterford facility pursuant to an investigation by NRC, did that memo then become an NRC document, I guess?

Mr. **Roberts**. Did it become what?

Senator **Breaux**. An NRC document? I mean, did the document then become the property of the Nuclear Regulatory Commission?

Mr. **Roberts**. Well, I'm not sure I can answer that precisely. I will say this—and I'm anticipating, perhaps, a further question—I consider this a matter that related to me personally, and I asked for all of Mr. Hayes' documentation because I wanted a complete file on a matter I thought related to me personally.

Senator **Breaux**. If a document was obtained by an inspector working for the NRC during the conducting of an investigation of the Waterford facility, why would you conclude that that document would be a personal document for you as opposed to a document that belonged to the NRC?

Mr. **Roberts**. Senator, that's a legal issue and I'm not equipped to answer that. It may well be an NRC document. I don't know. But in this particular circumstance I thought this related to me, my conduct, the conduct of my office, and I very strongly felt that it related to me.

Senator **Breaux**. Well, did Mr. Ward, when he came back from investigating the Waterford plant, come to you and say, here, Mr. Roberts, this is material that relates to you?

Mr. ROBERTS. No, I'm not sure. But as I understand it he went to his superior, Mr. Hayes, and said, here, look what I found, at which point Mr. Hayes went to see the Chairman.

Senator BREAUX. You then took the documents, however, and distributed it to the other Commissioner. Would that be something that you would normally——

Mr. ROBERTS. I'm not sure I distributed it to the other Commissioners. I had it with me when I hand-delivered Chairman Palladino's memorandum. My recollection is, I showed it to them. That is my recollection. I do not think I gave them copies.

Senator BREAUX. Do you recall the Freedom of Information request, then, that was numbered 85-184 from Lynn Cunningham of the New Orleans Times Picayune which requested "all correspondence, memoranda, reports, studies, and other documents that had been generated from the Office of Investigations, investigations or reviews of matters concerning the Waterford 3 nuclear plant at Taft, Louisiana, owned by Louisiana Power and Light?"

Mr. ROBERTS. I don't specifically recall that. And those requests are handled by my office staff.

Senator BREAUX. You are aware that your office received the Freedom of Information request?

Mr. ROBERTS. I would assume they would.

Senator BREAUX. I note that a memorandum dated March 28th, 1985, a memorandum for a number of gentlemen, one of which is Mac Cutchin, from Tom Combs, Chief, Correspondence and Records, the subject being the Freedom of Information request from Lynn Cunningham for records generated as a result of OI investigations or reviews of Waterford 3—there is a note next to Mac Cutchin that indicates, "no documents." And the memo from Tom Combs stated, "Attached is the subject request. Please search your office files and forward any documents subject to the request, except those originated in another Commissioner or staff office, by COB April 2nd, 1985. Any recommendation to withhold should be coordinated with the Office of General Counsel." Was that request brought to your atention? In the normal course of business would it normally be brought to your attention by your staff, or would they handle that without talking to you?

Mr. ROBERTS. They would search the files.

Senator BREAUX. Would it be normal for them to answer the memorandum without speaking with you as to whether there were any documents that would be subject to the Freedom of Information request?

Mr. ROBERTS. That might vary on a case-by-case basis. Just a routine request, I probably wouldn't be consulted.

Senator BREAUX. Well, it was routine only in the sense that Freedom of Information is a routine request. But this is a request dealing with documents that occurred shortly after your meeting with Ben Hayes where you all discussed the George White memo, just a couple of weeks after, as a matter of fact. Therefore I think it takes it out of the category of being a routine request. Don't you agree with that?

Mr. ROBERTS. Yes, it sounds like it would be. But let me say this and clairfy so you'll understand. I didn't destroy the documents I got from Mr. Hayes. I put them in the well of a desk drawer at my personal desk and I had forgotten I had done that. And Mr. Cutchin, in responding to a FOIA request, would not have had any idea what was in my desk drawer. I'm making a supposition; he may have asked me if I had any documentation. I frankly, to this day, don't recall putting those documents in the well of that desk. I do not recall it. I found them, so I obviously did put them there.

Senator BREAUX. Well, if you hadn't told Mr. Cutchin that you had destroyed the documents at that time, wouldn't he consider that the documents would still be in your office and subject to the Freedom of Information request?

Mr. ROBERTS. Senator, I just don't recall.

Senator BREAUX. I'm trying to find out why Mac Cutchin on March 28th, shortly after meeting with Ben Hayes, yourself and William Ward, descussing a George White memo dealing with the Waterford plant that was found as the result of an Office of Inspection/Inspector General's investigation of the Waterford plant—that when he gets a Freedom of Information request for documents that clearly come under that general description, responds that there are no such documents in your office of under your control. Did he do that because you told him you destroyed the documents? Or did he do that because you told him to put down, "no documents are present"? Or did he do that because you told him to put down, "no documents are present"? Why would he have responded, "no documents," when two weeks prior to that he looked at a document that fits the description of the documents that were requested?

Mr. ROBERTS. That's a very good question. I don't know. In no way have I ever purposely or intentionally tried to thwart a Freedom of Information request.

Senator BREAUX. Are you telling us that this Freedom of Information request, you did not get it, you did not see it? It was handled by the staff?

Mr. ROBERTS. That's my recollection.

Senator BREAUX. Did you discuss in the meeting with Mr. Hayes and Mr. Ward and Mr. Cutchin prior to this Freedom of Information request what would happen if anyone ever asked for the George White memo?

Mr. ROBERTS. I don't think that was ever discussed.

Senator BREAUX. But there's no question that the meeting with Ben Hayes and Mr. Ward and Mr. Cutchin and

> yourself—that the George White memo was discussed at that time?
>
> Mr. **Roberts**. That was the reason for the meeting.
>
> Senator **Breaux**. So Mr. Cutchin knew about the George White memo, you knew about the George White memo. You get a Freedom of Information request for something that sounds like the George White memo, and the response comes back from your office that there are no such documents. And I'm just trying to find out, is it because Mr. Cutchin was told by you that the document was destroyed?
>
> Mr. **Roberts**. I don't think I told him that the documents were destroyed.
>
> Senator **Breaux**. Can you give us any—I don't want to belabor the point, but can you give the Committee any reason why, when the Freedom of Information request was made, that we get the response that there are no such documents existing?
>
> Mr. **Roberts**. I don't have a very satisfactory answer. I'm sorry.[116]

Following that hearing, on June 5, 1987, Mr. Roberts' attorney submitted to the Subcommittee additional information on FOIA request 85-184.[117] In pertinent part, that communication makes the following points:

> 1. Mr. Roberts was not consulted by anyone on his staff about FOIA request 85-184.
>
> 2. FOIA request 85-184 initially requested all correspondence, memoranda, reports, studies and other documents that have been *generated* from OI Investigations Or Review of Matters Concerning The Waterford Unit 3 Plant." [emphasis added in original.] The memorandum of instruction stated, "Please search your office files and forward any documents subject to the request, except those *originated* in another Commissioner or staff office, . . . [emphasis added in original].
>
> 3. On March 29, 1986, Mr. Cutchin nevertheless responded to the Secretary on behalf of Commissioner Roberts' office: "Please advise J. Cawley that TMR office has no documents *generated* here." [emphasis added in original.] Mr. Cutchin has confirmed to us that he read Request 85-184 to require only documents written or prepared by Commissioner Roberts' office with respect to then pending Waterford investigations, of which there were apparently several. Neither the "White memorandum" nor, indeed, Mr. Palladino's March 14 memorandum regarding the 1983 incident were ever even considered by Mr. Cutchin to be responsive to the request. It was for that reason, and that reason alone that Mr. Cutchin did not ask Mr. Roberts for any such documents. Mr. Cutchin confirms that the first time Commissioner Roberts told him that the documents relating to the investigation of the 1983 leak may have been discarded was in March of 1987. No such statement or

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[116] *Id.*, pp. 31-8.

[117] Letter from Terrence O'Donnell to the Honorable John Breaux, June 5, 1987.

representation was made by Mr. Roberts to Mr. Cutchin in March 1985.

4. The scope of FOIA request 85-184 appears to have been construed similarly by other Commissioner offices.

5. The request appears to have been construed uniformly to require only the production of documents written or prepared by Commission staff relating to then pending enforcement actions.

In view of the allegations raised at the April 9th hearing before the Committee on Governmental Affairs, the Office of Special Investigations of the United States General Accounting Office was asked to conduct an independent investigation of this matter by four members of the House of Representatives: Chairman Morris K. Udall, Subcommittee on Energy and the Environment, House Committee on Interior and Insular Affairs; Chairman John D. Dingell, Subcommittee on Oversight and Investigations, House Committee on Energy and Commerce; Chairman Philip R. Sharp, Subcommittee on Energy and Power, House Committee on Energy and Commerce; and Congressman Edward J. Markey, Committee on Energy and Commerce, and Committee on Interior and Insular Affairs.[118] On April 22, 1988, the Office of Special Investigations released its report focusing on whether the NRC properly handled the question of whether a regulated utility had uncontrolled access to internal NRC documents.[119] GAO reached the following conclusions:

1. Without determining how NRC documents came into the possession of Middle South Utilities, GAO has been unable to ascertain whether any Federal law or NRC regulation was violated.

2. GAO's investigation verified that no LPL or Middle South Utilities official brought to the attention of the NRC an employee's assertion of the existence of a "mole" within the NRC. White's memorandum, no matter how self-serving, demonstrated that a regulated utility secured unauthorized access to NRC documents. The ability to obtain such materials could impact on the NRC's enforcement program, licensing functions, and regulatory procedures.

3. GAO determined that Roberts did not concern himself with the question of how White obtained the NRC documents, but only addressed the issue of whether someone on his personal staff might have been the utility's avenue of access.

4. Chairman Palladino's referral of the matter to Roberts for handling did not oblige Roberts to adhere to relevant investigative standards. Palladino, like Roberts and the other Commissioners, apparently believed that the referral and disposition of this matter was an exclusive delegation of investigatory authority and discretion. An April 16, 1987, opinion from the NRC's General Counsel appropriately points out the error in

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[118] Letter from John D. Dingell, Morris K. Udall, Philip R. Sharp, and Edward J. Markey, to the Honorable Charles A. Bowsher, Comptroller General, U.S. General Accounting Office, June 22, 1987.

[119] Special Report, Office of Special Investigations, U.S. General Accounting Office, Apr. 22, 1988.

this assumption by distinguishing between the functions of supervision and investigation.

5. The less-than-professional handling of the matter by the NRC, combined with Roberts' cursory investigative effort, might well have jeopardized any possibility for determining where or how White obtain the NRC documents. When the issue first surfaced in 1985, a properly conducted investigation, including an interview of White, might have provided NRC with the identity of "the source within the NRC."

SUBCOMMITTEE CONCLUSIONS

Based upon the investigation conducted by the Subcommittee, including the facts set forth in this Part, the Subcommittee has reached the following conclusions:

1. The Subcommittee has been unable to determine whether the original Joosten memorandum of June 6, 1983 was a sensitive document. The memorandum did, however, suggest the need for both further inspection and investigative activity by the agency.

2. Either no steps were undertaken within Commissioner Roberts' office to evaluate the sensitivity of the Joosten memorandum, and thereby determine whether it could be released to persons outside of the agency, or the distribution of the document was inadequately controlled, or both.

3. As stated in Conclusion No. 1, the Subcommittee has been unable to determine whether the Joosten memorandum, or the issues identified in that memorandum, were sensitive. Nevertheless, the Subcommittee finds that the Commission should have had a clearly established procedure for determining whether a document of this nature (*i.e.*, one dealing with items that might lead to an investigation, but that are not yet the subject of a pending investigation or a criminal referral, or the issues raised therein, are sensitive and, accordingly, should not be disclosed outside of the agency. If the June 6, 1983 Joosten memorandum was, itself, a sensitive document or raised issues of a sensitive nature, it does not appear to the Subcommittee that it was appropriate to:

   a. Provide Louisiana Power and Light with the inquiry team report, or at least that part of the report dealing with the matters that were the subject of the Joosten memorandum and the Commission's intention to investigate these matters further.

   b. Disseminate the inquiry team report, or at least that part of the report dealing with the matters that were the subject of the Joosten memorandum and the Commission's intention to investigate these matters further, in response to a Congressional request, without any restriction on the use or distribution of the report.

   c. Release the memorandum from J.H. Sniezek to M. Peranich, with the Joosten memorandum attached, in response to FOIA 83-508, and then, in further response to that same request, to release the Joosten memorandum itself on March 2, 1984.

The Subcommittee notes that if the Joosten memorandum, or the issues raised therein, were indeed sensitive from an investigative standpoint, we found no evidence that the Office of Investigations objected to the disclosure of this memorandum, or the issues raised therein, to the public generally or to the licensee specifically, on the numerous occasions, discussed above, when that information was disseminated outside of the agency. It was not until Commissioner Roberts' copy of the document was discovered in the files of Louisiana Power and Light in March of 1985 that the Office of Investigations first identified concerns about the disclosure of this information.

4. The Subcommittee notes that the Commission has recently adopted several policies with respect to communications between the NRC and licensees on various matters,[120] including one specifically addressing the timing of the disclosure to licensees of pending investigations. This policy provides that generally, there should be no need to disclose the fact that an investigation is either contemplated or underway when providing information to a licensee pertaining to safety concerns or to obtain correction of a specified technical issue.[121] in the Subcommittee's view, this policy establishes the type of guidance that will contribute to ensuring that investigative information is not disclosed unnecessarily or prematurely.

5. The Joosten memorandum found in the files of Louisiana Power & Light came from the office of Commissioner Thomas M. Roberts. Given the circumstances of its discovery, including the George White cover memorandum, this matter warranted investigation.

6. A matter of this nature properly falls within the investigative purview of the Commission's Office of Inspector and Auditor and, accordingly, should have been investigated by OIA, rather than by Roberts himself.

7. The investigation undertaken by Commissioner Roberts was not sufficiently thorough. Roberts did not ask George White how he had obtained the Joosten memorandum. Nor did he follow up on the responses of the technical assistant, Steve Chesnut, to determine with greater certainty whether the document was released by Chesnut.

8. The Subcommittee does not find Roberts' explanation of how his office handled the 1985 FOIA request from Lynn Cunningham of the Times-Picayune persuasive.

D. COMANCHE PEAK

In the spring of 1986, Shannon Phillips, an employee of NRC's Region IV Office in Arlington, Texas, contracted then-Commissioner James K. Asselstine to bring to his attention concerns that Phillips and a contractor employee, James Sutton, had about the supervision by Region IV management of the Commission's inspection program at the Comanche Peak Steam Electric Station (CPSES) nuclear plant, then under construction.[122]

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[120] For a more detailed discussion of these policies, see Appendix 5.

[121] Memorandum from Victor Stello, Jr., Executive Director for Operations, Nuclear Regulatory Commission, to Office Directors and Regional Administrators, Nuclear Regulatory Commission, Mar. 2, 1987.

Phillips was originally assigned to the CPSES project in mid-1984 and was part of a special inspection team established by the NRC to assess the severity of numerous allegations concerning the design and construction of the CPSES project.

In the fall of 1985, a number of managerial changes occurred in Region IV: Eric Johnson took over as Division Director and Thomas F. Westerman took over as Chief of the Region IV Comanche Peak Task Group. Phillips reported to Westerman; Westerman, in turn, reported to Johnson; Johnson reported to the Administrator of Region IV, Robert D. Martin.

Up until that point, as recounted by Phillips before the Committee on Governmental Affairs of the United States Senate on April 9, 1987, he and other inspectors were premitted the "organizational freedom to identify deviations and violations at the plant." [123] This all changed, however, with the new appointments. As Phillips described the situation:

> Westerman and Johnson began to challenge my inspection findings and those of other inspectors and consultants assigned to Comanche Peak. Westerman consistently suggested that we remove certain negative findings about the plant and that we downgrade violations to the category of findings called "unresolved items."
>
> Westerman's motivation for these actions was, according to his own statements, that he was there to license the plant. It is my belief that the basis for the intimidating conduct was my management's concern that negative inspection findings might reflect unfavorably on the licensee's performance and thereby reduce their chances of getting a license.[124]

From the time that Westerman and Johnson took over, Phillips maintains, there was a continuing pattern of pressure to downgrade negative findings in inspection reports to lesser categories or to delete them entirely. In addition to this pressure, Phillips contends that during this period of time, he was subjected to "management harassment".[125]

In January or February of 1986, the Region IV Administrator, Robert D. Martin, was first made aware that Phillips had voiced complaints about the handling of his and others' findings. At that time, Martin understood that the issues were being discussed and resolved. In February, meetings were held between Region IV managers and inspectors to discuss the basis for the disputed findings and how they should be resolved. These discussions continued into March, and Martin was specifically briefed on them.

At the same time that Region IV management was taking steps to address these concerns, several inspectors and contractors became increasingly concerned over what they perceived to be lax regulatory stance on the part of Region IV management.

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[122] Glenn hearing, p. 65.
[123] *Id.*, p. 63.
[124] *Id.*, pp. 63-64.
[125] *Id.*, p. 64.

In February of 1986, Phillips learned that an inspection report was issued by the Region without including several of the violations cited in his draft report. As Phillips described the situation:

> I knew that I had to report the matter and my overall concerns to someone independent of Region IV management. I also knew I could not report this to Region IV management because recent actions has convinced me that Region IV officials condoned or either directed the misconduct of Westerman and Johnson. . . . I was aware of the NRC's Office of Inspector and Auditor, but knew of its reputation of being unable or unwilling to investigate the type of serious management issues that I was raising.[126]

On March 11, 1986, Vince Noonan of the Office of Nuclear Reactor Regulation (headquarters) called Martin to tell him that he had received a call from Phillips complaining about Region IV's handling of inspection findings. During that discussion, Denton advised Martin that in view of the technical and procedural nature of the disputed findings, this dispute did not fall within OIA's purview.[127]

In response to the concerns that had been identified, Martin met with his Deputy and the two Comanche Peak supervisors on March 12 to lay out a program for formally reviewing all of the technical concerns of the Comanche Peak inspectors, with the assistance of representatives from NRR and IE (headquarters). On the following two days, the Comanche Peak Group Chief interviewed all of the remaining inspectors and consultants to determine the extent of their concern with respect to the handling of their findings.

Phillips, according to his testimony on April 9, decided in March of 1986 to take his concerns to Commissioner Asselstine.[128] After explaining the situation to Asselstine, Phillips indicated that he would be agreeable to talking with George Mulley, the Assistant Director for Investigations in OIA, because of what Phillips felt was his personal reputation for professionalism. After hearing Phillips' concerns, Asselstine met with the Acting Director of OIA, Gary Edles, to discuss Phillips' allegations. As a result of that meeting, Edles agreed to assign the case to Mulley. Pursuant to Asselstine's request, Mulley agreed to transcribe all interviews conducted during the investigation.

Mulley's investigation began on March 18, 1986, when he was informed of the allegations. After reviewing the information provided by Phillips, OIA combined the specific instances of alleged wrongdoing into a general allegation that "Region IV management harassed and intimidated inspectors to pressure them to downgrade or delete proposed inspection findings at CPSES."[129]

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[126] Id. p. 65.

[127] Memorandum from Robert D. Martin, Regional Administrator, Region IV, Nuclear Regulatory Commission, to Victor Stello, Jr., Executive Director for Operations, Nuclear Regulatory Commission, Undated.

[128] Glenn hearing, p. 65.

[129] Report of Investigation, Allegations of Misconduct by Region IV Management with Respect to the Comanche Peak Steam Electric Station, File No. 86-10, p. 1.

During the initial stages of Mulley's investigation, Region IV management became aware of the OIA effort and, following a series of telephone conversations between Regional Administrator Martin, Sharon Connelly, Director of OIA, and Stello, Martin was informed that Chairman Palladino was requesting him to "suspend all further review of the inspector concerns pending completion of the OIA investigation."[130]

Mulley interviewed numerous individuals and then, on June 10, and 11, briefed the Commission on the status of the investigation.[131] On June 20, the Chairman was briefed separately. Mulley began reviewing the transcripts of his interviews during the week of August 4, and began to outline his draft report. On October 2, 1986, Mulley briefed Asselstine on the status of the investigation.

On October 27, Mulley provided the Director and Deputy Director of OIA with his draft of that part of the report dealing with Region IV's Quality Assurance Inspection Program. By November 7, Mulley had finished the section dealing with the allegations of harassment and intimidation and submitted it to the OIA staff and management for review. Mulley completed the final section on Form 766 data on November 20, Between November 24 and 26, OIA management and staff reviewed the report.[132]

OIA issued the final report to the Commission on November 26, 1986.[133] The report reached the following conclusions:

> *Allegation I:* Region IV Management Harassed and Intimidated Inspectors to Pressure Them to Downgrade or Delete Proposed Inspection Findings at CPSES.
>
> 1. OIA was unable to substantiate comments made by Westerman that Phillips construed to be harassing and/or threatening.
> 2. Westerman established a higher than normal threshold for assessing violations at CPSES. While at another plant he might have been more liberal in citing violations, he stated that at CPSES he was being very "tight" to make sure violations were absolutely correct. Becasue CPSES was in a contested hearing before the ASLB, Westerman did not want to write violations the utility could argue were technically incorret. He believed that would create unnecessary paperwork and could even raise questions regarding Region IV's technical competency.
> 3. OIA determined that there were 26 proposed violations and four proposed unresolved items that were either downgraded or deleted from the three inspection reports reviewed by Westerman after he became the Chief, Region IV Comanche Peak Group in October 1985.

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[130] Memorandum from Robert D. Martin, *Supra* note 127.

[131] Memorandum from George A. Mulley, Jr., Assistant Director for Investigations, Office of Inspector and Auditor, Nuclear Regulatory Commission, to File 86-10, "Comanche Peak Chronology", Dec. 12, 1986.

[132] *Id.*

[133] Report of Investigation, Allegations of Misconduct by Region IV Management with Respect to the Comanche Peak Steam Electric Station, File No. 86-10, Nov. 26, 1986.

4. OIA's technical reviews of 16 proposed violations determined that Westerman used his prerogative as a manager to downgrade proposed violations when there did not appear to be sufficient information to support the violation. However, OIA found that in many cases the rationale used by Westerman to downgrade the violations was faulty.

5. Westerman identified several proposed violations as unresolved items to demonstrate to the inspector he did not avoid issues even though he believed further inspection activity would not develop violations. This practice was contrary to the requirements in IE Manual Chapter 0400 and 0610.

6. When Westerman believed Region IV insepctors did not develop sufficient information to adequately support proposed violations, he questioned the proposed violations. However, he did not provide adequate direction or guidance to the inspectors to obtain the additional information he believed necessary to either develop violations or resolve the issues. Instead, in most cases, he downgraded the proposed violations in the final inspection reports.

7. Westerman and Johnson delayed two memoranda to NRC Headquarters which were written by Phillips to resolve ongoing technical issues at CPSES.

8. Westerman deleted proposed violations from draft inspection reports based on information received from the utility well after completion of the inspections. The original issue and the additional inspection activity was not documented in the final inspection reports. While this action appeared consistent with Region IV policy as expressed by Johnson, in several instances the implementation of this policy was inconsistent with the policy as stated by IE.

9. Westerman and Johnson acknowledged the inspectors' disagreement with the manner in which proposed inspection findings were deleted or downgraded in final inspection reports. Westerman and Johnson were also aware that Phillips did not concur with changes made in inspection reports and signed the reports only because management wanted him to. Westerman and Johnson accepted this situation and took no action to address the inspector's disagreements.

Allegation II: The Region IV QA Inspection Program at CPSES Was Inadequate.

1. Based on the available information, it appears that [the QA Inspection Program] at CPSES Region IV did not satisfy the frequency requirements for the IE Manual Chapter 2515 QA inspection procedures reviewed by OIA. OIA noted that the requirements of this IE inspection program had changed over the years making it difficult, at this date, to determine if past Region IV inspections fulfilled the QA inspection procedures prescribed by the Manual Chapter. Additional-

> ly, none of the Region IV management officials interviewed by OIA could state whether the Region IV QA inspection program at CPSES met the IE Manual Chapter 2512 requirements. The Region IV management officials could only conjecture as to how the Region IV QA program complied with IE Manual Chapter 2512. Consequently it appears that it would not be possible to rely on the Region IV QA inspection effort as evidence of the safe construction of CPSES. This, in combination with the deficiencies identified in TUGCO's implementation of its QA program, means that to determine the adequcy of plant construction it will be necessary for the NRC to rely largely on the detailed technical inspections of various structures, systems and components that have recently been conducted by the NRC at CPSES.
>
> *Allegation III:* Data Documented in Region IV's NRC Form 766 Inspector's Report was Inaccurate.
>
> 1. Based on information developed during this investigation, the data recorded in the NRC Forms 766 pertaining to CPSES is inaccurate and unreliable. The incorrect reporting ranged from inspection activity recorded on the NRC Forms 766 for which there was no documentation in associated inspection reports to listing inspection modules as 100 percent complete on the forms without completing the recommended inspection activity, merely to close the module. The cause of the discrepancies appears to be a lack of understanding on the part of NRC inspectors as to the proper method of completing the NRC Forms 766.[134]

On December 21, 1986, the Commission announced that it was requesting recommendations from its Executive Director for Operations concerning the issues identified in the OIA report. On January 15, 1987, the Commission approved the formation of the Comanche Peak Report Review Group (CPRRG) to evaluate the OIA report, and appointed Guy A. Arlotto Chairman of the Group. The CPRRG was charged with providing recommendations on five specific matters:

> 1. the safety significance of the 34 issues identified in the OIA Report;
> 2. whether the issues identified on the OIA Report were appropriately handled in terms of process and disposition;
> 3. whether the current augmented review and inspection effort at Comanche Peak is sufficient to compensate for any identified weaknesses in Region IV's quality assurance inspection program;
> 4. the purpose and significance of NRC Form 766; and
> 5. whether the issues raised with respect to Comanche Peak have broader implications in Region IV.[135]

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[134] *Id.*

[135] *See* Memorandum from Victor Stello, Jr., Executive Director for Operations, Nuclear Regulatory Commission, to Lando W. Zech, Jr., Chairman, Nuclear Regulatory Commission, Apr. 14, 1987.

The CPRRG specifically did not duplicate the OIA investigation nor develop any independent record of testimony (although it did request and receive some additional documentation); it did not address the licensability of the Comanche Peak facility; and it did not investigate or otherwise inquire into any matters of wrongdoing, misconduct, or mismanagement except to the extent that such matters were explicitly identified in the OIA Report and its attachments and then only for the purpose of identifying factors that might have caused or contributed to the matters considered in the OIA Report. However, the CPRRG did perform a complete review of the OIA Report and all the supporting attachments thereto.

The CPRRG issued its report on March 12, 1987,[136] in which the following five conclusions were reached:

> 1. None of the 34 issues identified in OIA Report 86-10 was found to be significant in terms of any direct adverse impact on plant safety;
>
> 2. Region IV's disposition, i.e., classification, of the identified issues was appropriate, and the Region acted within its authority based on the information contained in the inspection reports and on the guidance available for determining the classification of the findings, e.g., violation, unresolved [sic]. Certain issues were not appropriately processed; e.g., inspection findings were in some cases not developed by the inspectors in accordance with agency guidance, and Region IV supervision did not always provide the guidance necessary to properly focus and resolve items.
>
> 3. When measured against the 1986 inspection program requirements, gaps were identified in the total inspection program. The current augmented review and inspection effort at Comanche Peak has, for the most part, compensated for gaps in scope and coverage in Region IV's QA inspection program.
>
> 4. The 766 system, primarily used by IE and little used by the Regions, is not used in making safety decisions. The accuracy, completeness, and timeliness of the data are not adequate for many needs, Overall, the 766 system does not satisfy current agency needs.
>
> 5. The CPRRG's judgment is that broader implications are likely for facilities in Region IV other than Comanche Peak. Additional considerations may influence the significance of these implications.[137]

The CPRRG Report was provided to the Commission on March 17, 1987.

On April 9th, at a hearing before the Committee on Governmental Affairs of the United States Senate,[138] George Mulley criticized the actions of the Director of OIA, Sharon Connelly, and the NRC Executive Director for Operations, Victor Stello, with respect to their handling of the OIA Comanche Peak Report. Specifically, Mulley told the Committee that Connelly had substantially modified his report when she reviewed it, deleting the conclusions he had reached and refocusing the report on the merits of the technical issues underlying the violations that the inspectors had found at Comanche Peak. Moreover, Mulley testified, she removed many of the quotations from Region IB managers—statements that substantiated the conclusions reached in his report.

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[136] Review of Issues Raised by OIA Report 86-10 concerning the Comanche Peak Steam Electric Station: Report of the Comanche Peak Report Review Group, NUREG-1257, Mar. 1987.

[137] *Id.*

[138] Glenn hearing.

Stello, Mulley testified, pressured him to complete the investigation and write the report, leaving him no choice but to limit the investigation to the specific concerns originally raised by Phillips and to ignore, for the time being, other witnesses' complaints of Region IV's regulatory mismanagement of other plants and the evidence of harassment, intimidation, and pressure on other inspectors. Mulley also testified that Stello, after obtaining approval of the Commission, distributed the report throughout the agency. Mulley testified:

> This was a very unusual way of dealing with an OIA report. It was also, in my opinion, a very unsatisfactory way of treating the report because it disclosed throughout the agency the testimony of the persons who had put their faith in the OIA office and in me personally. I was not consulted when the internal distribution was made so that I could comment on the decision and inform the individual witnesses.
>
> Within days of the release, I was contacted by witnesses who had given me testimony under oath and who were extremely distressed that their testimony had been disclosed throughout the agency. Most of these individuals felt that the distribution was done purposely to expose them to possible future retaliation.
>
> It is my personal belief that the distribution of this report has destroyed the rapport that I had developed with these witnesses and that it will be extremely difficult, if not impossible, to get any NRC employees or others to cooperate with other ongoing investigations of Region IV management.[139]

In response to these charges, Stello, in a sworn statement provided to the Committee on Governmental Affairs on April 28, 1987, stated:

> About March 19, 1986, I was informed that OIA had commenced an investigation addressing allegations of Region IV management wrongdoing relative to Comanche Peak inspection activities. Based on that, the Director OIA and I reached agreement that Region IV would cease further staff action to resolve the inspection issues in contention. In addition, I made arrangements that subsequent inspection findings of Mr. Phillips, the involved Resident Inspector, would be reviewed by Headquarters staff and

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[139] *Id.*, pp. 61-2.

management rather than the involved Region IV managers.

For about 4 or 5 months OIA continued their investigative work. I became increasingly aware of the negative impact it was having on the morale and effectiveness of both staff and management in Region IV. I became increasingly concerned that the investigation was detracting from Region IV personnel from performing their basic job of protecting public health and safety. Some of the managers for Comanche Peak activities also have responsibilities covering the seven operating nuclear stations in their region.

In the early summer of 1986, I met with Mrs. Connelly and Mr. Mulley. I expressed my concerns to get the investigation completed. I offered staff assistance to OIA and asked if there were anything else I could do to help them conclude their work. At that time, I was informed the report might be finished in August. In fact, the report was not finished until November.

Mr. Mulley chose in his testimony to characterize my actions as pressure. Frankly, I think I was only doing my job as the responsible staff manager considering the negative morale impacts the OIA work was having in the Region. Further, in a personal sense, I kept a humane balance. Upon hearing in late July from Mr. Mulley that a member of his family was undergoing surgery, I strongly suggested that Mr. Mulley consider his priorities and take whatever time he needed.

It was also suggested by two witnesses that the OIA Report of Investigation 86-10 was indiscriminately distributed throughout the agency. In reference to a December 4, 1986 Commission directive to take action as a result of the Report, the Report was initially distributed to only a limited number of senior management officials and selected staff members who were charged with the task of reviewing the Report and its very voluminous attachments in a short timeframe for the purpose of assessing:

(1) whether the Report identified any issues that were of such a nature in terms of safety that immediate action was called for;

(2) whether the Report identified any grounds for immediately initiating any personnel actions;

(3) whether the Report could be released to the public in its entirety or whether deletions were necessary in order to prevent unwarranted invasions of personal privacy, to preserve the NRC's ability to effectively inspect or investigate any matters identified or refer matters to the Department of Justice for action, or otherwise to preserve the ability of the NRC to act on the Report's findings (i.e., were predecisional); and,

(4) what bearing the Report might have in the ongoing licensing proceeding related to the application for operating licenses for Comanche Peak.

> Very shortly after the initial limited distribution, I requested and obtained the Commission's approval to provide copies of the Report and its attachments to six named Region IV staff members who were central to the OIA investigation. I did this for two reasons: first, out of concerns of fairness, to permit these persons to have accurate information concerning the Report prior to its release so that they could knowledgeably deal with the anticipated public inquiries that would most likely follow any public release of the document; and, second, so that management could discuss the Report with them in addressing the issues stated above.
>
> On December 11, 1986, the Commission approved the public release of a redacted version of the Report, with the names of all individuals and certain other information potentially relevant to the conduct of an investigation deleted.
>
> I considered all allegations to be very serious and, with the approval of the Commission, I established the Comanche Peak Report Review Group (CPRRG) and changed it with conducting a comprehensive review of the issues raised in the Report and making recommendations to address the issues. I gave the Chairman of the CPRRG special authority to draw upon whatever staff or consulting resources were necessary or appropriate to comprehensively address the issues. Extensive efforts by senior management and other staff personnel resulted in the CPRRG Report dated March 12, 1987. On April 14, 1987, I transmitted to the Commission my recommendations and proposed actions, and on April 16th, I briefed the Commission and requested its approval to implement the recommended actions. I also urged prompt release to the public of the OIA Report, the CPRRG Report and my April 14th recomendations.[140]

On July 2, 1987, Sharon R. Connelly submitted a statement to the Governmental Affairs Committee, responding to the charges as follows:

> The recollections of the OIA staff involved in the Comanche Peak investigation differ from Mr. Mulley's description of certain events surrounding the investigation and preparation of the investigation report. Mr. Mulley's testimony is puzzling in view of the fact that (1) the scope of the investigation was left entirely to Mr. Mulley's discretion; (2) Mr. Mulley reviewed and approved all review comments before he included them in his report; (3) all transcripts and reports of interviews were included in the investigation report; and (4) the conclusions in the final report were Mr. Mulley's, although he sought guidance

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[140] Letter from Victor Stello, Jr., Executive Director for Operations, Nuclear Regulatory Commission, to the Honorable John Glenn, Chairman, Committee on Governmental Affairs, Apr. 28, 1987, pp. 15-18.

from me as Director, OIA, on how to formulate the conclusions . . .

In regard to the scope of Mr. Mulley's investigation, it is important to note that there was no direct OIA management involvement in the Comanche Peak investigation until October 1986. At that point, Mr. Mulley had completed his investiation and was writing his report. The scope and investigative techniques (other than those directed by Commissioner Asselstine) were solely Mr. Mulley's determinations. The decision to defer action on any other issues raised during his investigation was entirely Mr. Mulley's. At no time did Mr. Mulley indicate to OIA management that he wanted to expand the scope of this investigation to include other plants in Region IV or other allegations involving inspectors. Rather, he specifically advised OIA management he wanted to investigate allegations regarding Ft. St. Vrain Nuclear Generating Station and alleged violations of the Freedom of Information Act in separate investigations to be conducted at a later time. . . .

There is no doubt there was considerable interest throughout NRC in completing the Comanche Peak investigation. We did not consider this interest to be undue or inappropriate pressure, but rather a legitimate management desire to identify and address any concerns regarding operations in Region IV. This interest was coming from many sources. Clearly, the Executive Director for Operations (EDO), as he has already testified, very much wanted OIA to complete its investigation so he could move to resolve the concerns relative to Region IV. The Region IV Administrator made several inquiries regarding the status of the case as he also wanted to resolve any issues concerning Region IV. The Chairman asked that OIA give this case priority attention; however, he also stressed that we should take the time needed to produce a quality product. Commissioner Asselstine took a personal interest in the investigation from its inception. . . .

Mr. Mulley stated . . . Sharon Connelly personally participated in modifying my draft report. Connelly removed the conclusions I had written . . . Mr. Mulley's assertion that he had concluded that Phillips had been harassed and intimidated is not supported by the facts. At least three members of the OIA team reviewing/verifying the draft report specifically remember that the draft report prepared by Mr. Mulley contained *no* conclusion regarding harassment and intimidation. If Mr. Mulley had reached that conclusion on this central investigative issue, it is strange he did not write it in the draft report . . . The conclusions in the final report were Mr. Mulley's conclusions. Shortly before the report was issued (a matter of days) Mr. Mulley came to me and asked what I wanted to include in the conclusions. I advised him that the conclusions should be a summary of his findings in the investigation. He specifically asked for my assistance in drafting the conclusions. He and I together reviewed the report, identified the

> issues that he believed should be addressed in the conclusions, and summarized the investigative findings. Any input I had to this process was based totally on the information Mr. Mulley provided to me. . . .[141]

At a subsequent hearing before the Subcommittee on Nuclear Regulation on October 8, 1987, Mulley testified to the following significant points:

> [A]s the report was being processed I had some disagreements with the way the report was being prepared and put together. I expressed these disagreements to the OIA management staff.
>
> * * * * *
>
> With the OIA report, everything that I developed through my investigation, all the testimony, was in the report. I disagreed to some extent about the way the report was being prepared. I felt in certain areas we could have been stronger. I think in certain areas, for example the technical issues, I felt that we were overemphasizing the technical issues.
>
> * * * * *
>
> When I put together my report and I went through the testimonial evidence and what I had gathered, it was my belief that the inspector had been harassed by management as a result of his inspection findings.
>
> * * * * *
>
> Mr. Stello's staff is certainly the qualified people to look into the technical issues out at Comanche Peak and decide whether they were valid findings or not.
>
> * * * * *
>
> The original way I had written the report was changed. I later got together with Ms. Connelly and sat down; we came to a mutal understanding. She presented some managerial considerations to me concerning the report and how it should be written. I might not agree with them, but certainly there was nothing wrong in the way she wanted to write the report. It wasn't the way I necessarily would have written it, but there was nothing wrong—illegal or anything like that, or immoral—it was just different from the way I would have wanted it written. We came to an agreement as to how the report would be written. I consented to that, and wrote the report so that it pretty much was going to get out of the office.
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> * * * * *
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> As far as the content of the report, there was no attempt by anybody—Mr. Stello's staff or the Commission—to alter

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[141] Letter from Sharon R. Connelly, Director, Office of Inspector and Auditor, Nuclear Regulatory Commission, to the Honorable John Glenn, Chairman, Committee on Governmental Affairs, July 2, 1987.

> that. [Stello] just wanted something that he could work with, and he wanted it quickly.[142]

Since the OIA and CPRRG reports, NRC has taken a number of steps related to the Region IV-Comanche Peak situation. On the Regional Administrator's initiative, training has been provided to Region IV personnel to bolster possible professional weaknesses which may have contributed to the problems with the inspection reports. In addition, at the end of July 1987, the Commission announced major managerial and organizational changes in the Region IV Office, directed at strengthening the Region's responsibilities in nuclear power plant regulatory work. A new Deputy Regional Director has also been named. Two senior reactor safety experts from headquarters were reassigned to head the reactor projects division. A new Division of Reactor Safety was established in the Region and a new senior position of deputy director of the region's Division of Radiation Safety and Safeguards was established.

In view of the allegations raised at the April 9th hearing before the Committee on Governmental Affairs, the Office of Special Investigations of the United States General Accounting Office was asked to conduct an independent investigation of this mattter by four members of the House of Representatives: Chairman Morris K. Udall, Subcommittee on Energy and the Environment, House Committee on Interior and Insular Affairs; Chairman John D. Dingell, Subcommittee on Oversight and Investigations, House Committee on Energy and Commerce; Chairman Philip R. Sharp, Subcommittee on Energy and Power, House Committee on Energy and Commerce; and Congressman Edward J. Markey, Committee on Energy and Commerce, and Committee on Interior and Insular Affairs.[143] On April 22, 1988, the Office of Special Investigation released its report focusing on whether the Office of Inspector and Auditor properly investigated and accurately reported on the allegations related to the inspection program at CPSES.[144] GAO reached the following conclusions:

1. OIA's investigation of allegations that NRC managers in Region IV mishandled findings proposed by NRC Inspector Shannon Phillips was accurate; however the investigative processes used by OIA were questionable.
2. In support of the proposition that Phillips' findings had been improperly altered or deleted, OIA Investigator Mulley relied, in part, on statements by a former Region IV manager that Region IV management had a lax enforcement attitude. When interviewed by GAO, howver, this same individual said that the OIA investigator misunderstood his meaning and that the point he was trying to make was that there were philosophical differences about how well developed a finding must be before it should be cited as a violation. Region IV managers

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[142] Hearing of the Subcommittee on Nuclear Regulation on the Office of Inspector and Auditor, Nuclear Regulatory Commission, Oct. 8, 1987 (unpublished transcript).

[143] Letter from John D. Dingell, Morris K. Udall, Philip R. Sharp, and Edward J. Markey, to the Honorable Charles A. Bowsher, Comptroller General, U.S. General Accounting Office, June 22, 1987.

[144] Special Report, Office of Special Investigations, U.S. General Accounting Office, Apr. 22, 1988.

Westerman and Johnson insisted that violations be cited only after the findings were fully developed and supportable, whereas some inspectors and managers believed in citing violations and placing the burden of proof on the utility to disprove them.

3. GAO's review indicated that Mulley was correct in asserting OIA should not have focused its report on the technical issues. Even with technical assistance, OIA lacked the expertise to resolve such issues in a competent fashion. If OIA found a need to challenge the technical judgments of Region IV management, it should have employed NRC's established procedure for resolution of differing professional opinions.

4. GAO was unable to verify Mulley's assertions that (i) he had been pressured to limit the scope and otherwise expedite completion of his investigation of the Phillips matter and (ii) his draft report had been substantially altered by Connelly. GAO reviewed all available drafts of Mulley's report and interviewed the principals involved in the preparation, editing, review, and approval process. No evidence was developed to indicate that substantive changes were made during the review and editing stages.

5. With regard to the distribution of Mulley's report, GAO found no basis to question the conduct of the EDO who explained that the Commission authorized the distribution to assist NRC management in addressing important matters, such as health and safety issues requiring immediate action. Witnesses told GAO they were disturbed about the distribution of the report containing unredacted transcripts of their statements to high-level management officials and to the principal witnesses. However, none of the witnesses identified in the OIA report or transcripts asked for or received a pledge of confidentiality from anyone in OIA, and Mulley voiced no objection to the release.

SUBCOMMITTEE CONCLUSIONS

Based upon the investigation conducted by the Subcommittee, including the facts set forth in this Part, the Subcommittee has reached the following conclusions:

1. The Subcommittee found no evidence of harassment or intimidation of Shannon Phillips by Region IV management. The conflicts that arose between Phillips and Region IV management, leading to allegations of harassment and intimidation and, ultimately, to the feeling on Phillips' part that he needed to raise these issues with NRC headquarters, could have been minimized or avoided by a more timely explanation by Region IV management of the bases for its decisions.

2. The technical issues examined in the investigation undertaken by the Office of Inspector and Auditor (OIA) were beyond the scope of OIA's mandate and expertise.

3. The Subcommittee found no evidence that the actions taken by NRC management regarding the preparation of the OIA report, including the expressions of interest that the report be completed promptly, the process employed for re-

viewing and finalizing the report, and the decisions with respect to circeulation of the report, were in any way improper or at variance with OIA procedures. The Subcommittee notes that individuals interviewed should be apprised at the time that they are interviewed of the procedures governing the confidentiality of information provided in the interview.

4. Upon completion of the OIA report, the Commission and NRC management responded in a timely and effective manner to assess the significance of the technical issues identified in the OIA report, leading to the conclusion that none of the 34 technical issus identified in the OIA report were significant from the standpoint of any direct adverse impact on plant safety.

5. There were deficiencies in the procedures employed by Region IV for the resolution of inspection findings. Upon the identification of these deficiencies, the Commission and NRC management responded in a timely and effective manner to address this situation.

APPENDIX 2. EXTERNAL LICENSEE INVESTIGATIONS

A. INTRODUCTION

On April 20, 1982, as a result of concerns about the Nuclear Regulatory Commission's ability to conduct credible, thorough, timely, and objective investigations and in the face of congressional criticism of the NRC investigative program in late 1981 and early 1982, the Nuclear Regulatory Commission (NRC) announced the establishment of the Office of Investigations (OI).[145] The Commission established this office to provide a centralized and high-level focus on investigations and charged it with the responsibility for conducting and supervising investigations of licensees, applicants, contractors, and vendors.

B. BACKGROUND

Prior to the establishment of OI, the conduct of Commission investigations was hampered by the lack of any clearly established agency policy assigning the responsibility for conducting investigations to a single office, staffed for, and dedicated exclusively to, the task of investigating potential wrongdoing by agency licensees.[146] Moreover, this lack of a clearly established policy had led to conflict between the Commission's Office of Inspection and Enforcement and the Office of Inspector and Auditor, with a corresponding confusion both within and outside of the agency over who had the responsibility for conducting investigations. In several cases involving potential criminality and major health safety issues, for example, IE and OIA traded charges about each other's adverse impact on investigations.[147] During this same time, the Department of Justice advised the Commission of concerns that it had about the Commission's approach to conducting investigations and the consequent potential for undermining DOJ criminal prosecutions of cases referred to it by the NRC.[148]

In view of these problems, Chairman Nunzio J. Palladino indicated his desire to review and, if appropriate, redefine the roles of OIA and IE with regard to NRC's investigative responsibilities.[149]

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[145] Memorandum from Nunzio J. Palladino, Chairman, Nuclear Regulatory Commission, to Directors of Offices and Divisions, Regional Administrators, and Assistant Directors and Branch Chiefs, Nuclear Regulatory Commission, Apr. 20, 1982.

[146] *See, e.g.*, Letter from Lawrence Lippe, Chief, General Litigation and Legal Advice Section, Criminal Division, Department of Justice, to Mr. William Dircks, Acting Executive Director for Operations, Nuclear Regulatory Commission, Mar. 7, 1980.

[147] *See, e.g.*, SECY-81-588, Investigative Jurisdiction of the Office of Inspection and Enforcement, Oct. 3, 1981, and Memorandum from James J. Cummings, Director, Office of Inspector and Auditor, Nuclear Regulatory Commission, Oct. 26, 1982.

[148] *Id.*

[149] Memorandum from Nunzio J. Palladino, Chairman, Nuclear Regulatory Commission, to James Cummings, Director, Office of Inspector and Auditor, Nuclear Regulatory Commission, and William J. Dircks, Executive Director for Operations, Nuclear Regulatory Commission, Feb. 1, 1982.

Palladino then initiated a workshop with the principal officials involved to develop a thorough understanding of the investigative issues.[150] As a result of the workshop held on February 8, 1982, Palladino formulated a set of conclusions and proposals.[151] Specifically, Palladino recommended that IE be assigned the responsibility for policy, procedural, training and quality control of both criminal and civil investigations of licensees. In addition, he recommended that the investigative and inspection functions be separate and distinct organizational entities within IE. OIA, in turn, would be responsible for auditing and investigating internal agency programs and activities, but would also participate in IE investigations of licensee-related matters.[152]

Palladino's recommendations were circulated for comment.[153] Based upon the comments he received, Palladino instead proposed the formation of an Office of Investigations, to report directly to the Executive Director for Operations and to be responsible for the conduct, supervision, and quality control of investigations of licensees, applicants, contractors, and vendors.[154] Commissioner Victor Gilinsky, in commenting on the proposal for a separate OI, indicated that he thought the proposal should clearly indicate that OI would have jurisdiction over criminal referrals to the Department of Justice arising from investigations of matters outside the NRC, and OIA should handle referrals which arise from investigations of matters within the NRC.[155] Commissioner Thomas M. Roberts indicated that he supported the proposal to set up a separate Office of Investigations, but recommended that OI report directly to the Commissioner rather than to the EDO.[156] He further indicated that "the Commission at later date could delegate this to EDO."[157] Finally, Roberts recommended that the staff of OI should be comprised of an NRC attorney at least during the time that OI is developing policy and procedural guidance; and that until guidance has been developed defining what an investigation is and how it will be conducted, the right to order an investigation be reserved to the Commission.[158]

On April 20, 1982, the Commission formally announced the establishment of the Office of Investigations.[159] The newly-established Office, which would report directly to the Commission, would assume the investigative functions and personnel of IE and the NRC regional offices, and would be responsible for, among other things, conducting and supervising investigations on the part of licensees, applicants, contractors or vendors at the request of the NRC staff, the Commission, or on its own initiative.

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[150] *Id.*

[151] Memorandum from Nunzio J. Palladino, Chairman, Nuclear Regulatory Commission, to James J. Cummings, Director, Office of Inspector and Auditor, William J. Dircks, Executive Director for Operations, and Richard C. DeYoung, Director, Office of Inspection and Enforcement, Nuclear Regulatory Commission, Feb. 11, 1982.

[152] *Id.*

[153] Memorandum from Nunzio J. Palladino, Chairman, Nuclear Regulatory Commission, to Commissioners Gilinsky, Bradford, Ahearne, and Roberts, undated.

[154] Memorandum from Nunzio J. Palladino, Chairman, Nuclear Regulatory Commission, to Commissioners Gilinsky, Ahearne, and Roberts, Mar. 22, 1982.

[155] Memorandum from Victor Gilinsky to the Chairman and the Commissioners, Mar. 25, 1982.

[156] Memorandum from Commissioner Roberts to Chairman Palladino and Commissioners Gilinsky and Ahearne, Mar. 31, 1982.

[157] *Id.*

[158] *Id.*

[159] Memorandum from Nunzio J. Palladino, Chairman, Nuclear Regulatory Commission, to Directors of Offices and Divisions, Regional Administrators, and Assistant Administrators and Branch Chiefs, Apr. 20, 1982.

Specifically, the announcement of the formation of OI indicated that OI would be responsible for:

1. The conduct, supervision, and quality control of investigations of licensees, applicants, contractors or vendors undertaken at the request of the Commission, the EDO, Regional Administrators, other Office Directors, or on OI's own initiative. This shall include investigating all allegations of wrongdoing by other than NRC employees and NRC contractors.
2. Developing policy, procedures, and quality control standards for the conduct of all OI investigations and ensuring that all OI investigators are properly trained.
3. Keeping abreast of inquiries and inspection of licensee, applicant, contractor or vendor operations and advising the Commission, the EDO, and Regional Administrators with regard to the need for formal investigations.
4. Keeping the rest of the agency informed of matters under investigation as they affect safety matters.
5. Advising and assisting the Office of Inspector and Auditor in appropriate referrals to the Department of Justice.[160]

James A. Fitzgerald, of the Commission's Office of General Counsel, was named Acting Director of OI and charged with the responsibility for developing investigative policy and procedures for Commission review and approval, as well as submitting recommendations on the staff resources necessary for OI to carry out its mandate.

C. DEVELOPMENT OF STAFFING LEVELS; INVESTIGATIVE POLICY AND PROCEDURES

In accordance with the Commission's directive, OI undertook to define the necessary staff resources and to develop investigative policy and procedures. In the context of this effort, Commissioner Roberts asked that OI address a number of questions about its authority and responsibilities.[161]

OI first submitted its recommendations on the staff resources that it felt were necessary to assure an adequate number of qualified and trained professional investigators at headquarters and in the regions,[162] recommending a staffing level of 58 full time permanent staff, including 33 support staff and 25 investigators. Commissioner Roberts indicated that he felt that the proposed staffing level was too "top-heavy." [163] In addition, he indicated that he did not believe that OI should initiate investigations on its own, preferring instead that the Commission be apprised of investigations so that guidance could be provided.[164] On June 4, 1982, Chairman

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[160] *Id.*

[161] Memorandum from Commissioner Roberts to James A. Fitzgerald, Acting Director, Office of Investigations, Apr. 22, 1982.

[162] Memorandum from James A. Fitzgerald, Acting Director, Office of Investigation, to Chairman Palladino and Commissioners Gilinsky, Ahearne, and Roberts, May 17, 1982.

[163] Memorandum from Commissioner Roberts to Chairman Palladino, May 26, 1982.

[164] *Id.*

Palladino advised the NRC staff that OI should be staffed at a level of 38 persons.[165]

On June 17, 1982, OI submitted its proposals on policy, procedural and quality control guidance, and training programs to the Commission for review and approval.[166] Among the policies proposed by OI was one providing that "OI investigations may be initiated at the request of the EDO, Regional Administrators, or Office Directors, by direction from the Commission, or on the initiative of the Director, OI." [167] Shortly following submission of OI's proposals, the Commission staff responded to the questions posed by Commissioner Roberts about OI's investigative practices and procedures.[168] On June 24, 1982, the Commission formally authorized the establishment of OI, directing OI to proceed with the selection and reassignment of personnel, subject to an overall staff limitation of 38.[169]

On July 16, 1982, OI added two additional recommendations to those originally submitted to the Commission on June 17, 1982, governing the investigative procedures for OI.[170] OI specifically recommended that, in addition to the general policy statement previously proposed, investigative procedures should be developed "to foster consistency in investigative actions and reports and improve the quality of investigations." [171] Accordingly, OI submitted proposed "Investigative Procedure Memoranda."

On July 16, 1982, Commissioner Roberts commented on OI's proposed policy statement and procedural guidance.[172] He specifically indicated that he did not believe that OI should be able to initiate investigations in the absence of a request from the EDO, regional administrators, or the Commission. He subsequently indicated that the investigative procedure memoranda (IPMs) should be approved by the Commission before becoming effective.[173]

On October 22, 1982, Chairman Palladino circulated a final draft of the investigatory policy proposals to the other Commissioners for review, containing 26 policies that would govern the activities of OI.[174] On the issue of whether OI should be able to initiate investigations on its own initiative, proposed Policy 4 provided that "OI investigations may be initiated at the request of the Commission, the Chairman, or the EDO, Regional Administrators, or on the initiative of the Director, OI, with the Chairman's concurrence." [175]

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[165] Memorandum from Nunzio J. Palladino, Chairman, Nuclear Regulatory Commission, to William J. Dircks, Executive Director for Operations, Nuclear Regulatory Commission, June 4, 1982. For additional discussion of the OI staffing level, see footnote [?] and accompanying text.

[166] Memorandum from James A. Fitzgerald, Acting Director, Office of Investigations, to Chairman Palladino and Commissioners Gilinsky, Ahearne, Roberts, and Asselstine, June 17, 1982.

[167] *Id.*, Policy 4.

[168] Memorandum from James P. Murray, Office of the Executive Legal Director, Nuclear Regulatory Commission, to James Fitzgerald, Acting Director, Office of Investigations, Nuclear Regulatory Commission, June 22, 1982.

[169] Memorandum from Nunzio J. Palladino, Chairman, Nuclear Regulatory Commission, to James A. Fitzgerald, Acting Director, Office of Investigations, Nuclear Regulatory Commission, June 24, 1982.

[170] Memorandum from James A. Fitzgerald, Acting Director, Office of Investigations, Nuclear Regulatory Commission, to the Commission, July 16, 1982.

[171] *Id.*

[172] Memorandum from Commissioner Roberts to Chairman Palladino, July 16, 1982.

[173] Memorandum from Commissioner Roberts to Samuel J. Chilk, Secretary, Nuclear Regulatory Commission, Sept. 14, 1982.

[174] Memorandum from Nunzio J. Palladino, Chairman, to Commissioners Gilinsky, Ahearne, Roberts, and Asselstine, Oct. 22, 1982.

On November 24, 1982, the Commission reached the following decisions: (1) the OI policies shall require an affirmative vote by the Commission to be effective and the OI Procedure Memoranda shall become effective if no adverse comments are made by the Commission within 10 working days of submission; (2) those procedures already issued by OI shall become effective as of November 30 if there are no adverse comments from Commissioners; and (3) OI should not proceed with any investigations of the Character/suitability of licensees without first requesting guidance from the Commission. [176]

The Commission continued its review of OI's proposed policies through the end of 1982. In late December, OI submitted a revised version of the proposed policies, reflecting comments from various Commissioners.[177] On the issue of self-initiation, OI recommended the following language: "OI investigations may be initiated at the request of a Commissioner, the EDO, or a Regional Administrator, or on the initiative of the Director, OI. The Director, OI, will promptly inform the Chairman of all investigations commended by OI." [178]

The Commission subsequently decided to defer action on the OI policy statements until a Director of OI has been selected by the Commission.[179]

On February 15, 1983, the Commission announced the appointment of Ben B. Hayes as the Director of the Commission's Office of Investigations. Shortly thereafter, Hayes submitted his recommendations on the earlier policy proposals to the Commission.[180] On the issue of OI's ability to self-initiate investigations, Hayes recommended the following language: "OI investigations may be initiated at the request of a Commissioner, the EDO, or a Regional Administrator, or on the initiative of the Director, OI. The Director, OI, will promptly inform the Chairman of all investigations commenced by OI." [181]

On March 4, 1983, the Commission advised Hayes that it had unanimously approved his proposed policies, with three exceptions.[182] On the issue of self-initiation, the Commission directive provided as follows:

> Policy 4 as adopted by the Chairman and Commissioners Ahearne and Roberts should read "OI investigations may be initiated at the request of the Commission, the EDO, or a Regional Administrator, or on the initiative of the Direc-

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[175] *Id.*

[176] Memorandum from Samuel J. Chilk, Secretary, Nuclear Regulatory Commission, to James A. Fitzgerald, Acting Director, Office of Investigations, Nov. 24, 1982.

[177] Memorandum from James A. Fitzgerald, Acting Director, Office of Investigations, to the Commission, Dec. 22, 1982.

[178] *Id.*

[179] Memorandum from Samuel J. Chilk, Secretary, Nuclear Regulatory Commission, to Chairman Palladino, Jan. 21, 1983.

[180] Memorandum from Ben B. Hayes, Director, Office of Investigations, to the Commission, Feb. 25, 1983.

[181] 181 *Id.*

[182] Memorandum from Samuel J. Chilk, Secretary, Nuclear Regulatory Commission, to Ben B. Hayes, Director, Office of Investigations, Mar. 4, 1983.

tor, OI. The Director, OI, will promptly inform the Chairman of all investigations commenced by OI."

Commissioners Gilinsky and Asselstine would have preferred to have allowed individual Commissioners to initiate such investigations.

Commissioner Roberts would have preferred to have limited the Director, OI's initiation of such investigations by requiring the concurrence of the Chairman.[183]

D. Reporting Relationship of OI; Continued Discussion of Staffing Level

The establishment of OI and the decision by the Commission that this Office should report directly to the Commission led to concerns from the House Appropriations Committee over the number of persons reporting directly to the Commission. This concern was first expressed by the Committee to the Commission in the context of the Commission's fiscal year 1986 budget.[184] In response, the Commission considered placing the Office of Investigations under the Executive Director for Operations. In view of the strong concerns from others in Congress and the Department of Justice, however, about placing the Office of Investigations under the direction of the NRC staff,[185] the Commission did not pursue the idea.[186]

In addition to the reporting relationship of OI, the Commission also sought to revisit the staffing issue.[187] On February 4, 1985,

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[183] *Id.*

[184] *See, e.g.*, H. Rpt. 98-755, appropriating funds for the NRC for fiscal year 1985, which provided as follows: "Over the past several years, the Committee has expressed its concerns over the NRC establishing duplicative and redundant staffs. The last two reports have specifically questioned the need for redundant legal and inspection organizations. The Commission level staff, as opposed to the Agency staff, has now grown to 261 positions. The Committee has been advised that this had led to increasing animosity and the development of an attitude of two separate agencies. The Committee is concerned with the growing lack of coordination and communication within the NRC. Accordingly, the Committee directs the NRC to take immediate action to review this situation and take steps to streamline and improve the management process. While the Committee has not recommended specific manpower ceiling reductions, it does expect the NRC to implement reductions to the Commission level staff prior to submission of the fiscal year 1986 budget."

[185] *See, e.g.*, letter from Morris K. Udall, Chairman, Committee on Interior and Insular Affairs, House of Representatives, to Nunzio J. Palladino, Chairman, Nuclear Regulatory Commission, January 14, 1985; letter from John D. Dingell, Chairman, Committee on Energy and Commerce, House of Representatives, House of Representatives, to Nunzio J. Palladino, Chairman, Nuclear Regulatory Commission, January 15, 1985; letter from Stephen S. Trott, Assistant Attorney General, Criminal Division, Department of Justice, to Nunzio J. Palladino, Chairman, Nuclear Regulatory Commission, March 18, 1985.

[186] At the time that this proposal was under consideration, Commissioner Roberts expressed the view that "OI conducts investigations primarily at the request of offices reporting to the EDO. Those investigations are related primarily to matters involving licensees and the contractors of licensees and are for the purpose of assisting the NRC in its *civil* enforcement of the Atomic Energy Act. They are not primarily for the purpose of assisting DOJ in enforcing criminal statutes." Memorandum from Commissioner Roberts to Chairman Palladino, January 18, 1985.

[187] The Commission had advised the Committee on Appropriations of the House of Representatives, in a letter of June 10, 1982, of the Agency's intention to consolidate its investigative functions in a new Office of Investigations. Although this letter did not specify the exact staffing level for the new office, it did indicate that its objectives could be met within existing NRC personnel levels. In a subsequent letter to the House Appropriations Committee, dated June 16, 1983, Chairman Palladino advised the Committee that an increase in investigative staff was needed, in view of the number of allegations requiring NRC investigation. To accomplish this, the Commission proposed to reallocate an additional eleven full time positions to the current staff of 38 in the Office of Investigations. Shortly after that request, the Commission reduced its request to an additional 6 staff. The House Appropriations Committee never provided a written response to the Commission's request and the reprogramming was never implemented. Since

Continued

Chairman Palladino proposed increasing OI's staff allocation by three additional full time equivalent staff (FTEs).[188] The other four Commissioners disapproved Palladino's proposal, on the ground that a threshold should first be established for OI investigations, before an increase in staffing is sought from Congress.[189] Accordingly, no action was taken to increase OI's staffing level.

E. THRESHOLDS FOR OI REFERRALS TO THE DEPARTMENT OF JUSTICE

In view of the interest in establishing appropriate thresholds for OI's activities, including referrals to the Department of Justice and the initiation of investigations, and in response to the handling of one specific referral where a conflict arose between OI and the Commission's Office of Inspector and Auditor,[190] the Commission first turned its attention to the question of establishing an appropriate threshold for the referral of cases to the Department of Justice. On March 21, 1985, Chairman Palladino circulated a proposal on OI and OIA referrals.[191] Palladino proposed that:

> OIA or OI consult with the Commission before making referral decisions in the following instances:
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> —Alleged material false statements, when, in OI's opinion, the allegation should be referred to DOJ.

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that time, the Commission has construed this response as an indication that the staff of OI was limited to 38 FTEs. For a more detailed discussion of the background of the OI staffing issue, *see* the Memorandum from Carlton Kammerer, Director, Office of Congressional Affairs, to Commissioner Asselstine, Jan. 24, 1985.

[188] Memorandum from Nunzio J. Palladino, Chairman, to Commissioners Roberts, Asselstine, Bernthal, and Zech, Feb. 4, 1985.

[189] Commissioner Roberts indicated that he remained opposed to an increase in OI's personnel until the Commission decided what threshold for initiation of an investigation was appropriate. *See* Memorandum from Commissioner Roberts to Chairman Palladino, Feb. 14, 1985. Commissioner Zech indicated that the then-ongoing audit of OI by the Commission's Office of Inspector and Auditor should be completed first. In addition, he indicated that he supported establishing an investigatory threshold before taking any action on OI's ceiling. *See* Memorandum from Commissioner Zech to Chairman Palladino, Feb. 12, 1985. Commissioner Asselstine indicated that he supported an additional 11 FTE, the level proposed by OI, and that the Commission should complete work on the screening procedures for OI investigations. *See* Memorandum from Commissioner Asselstine to Chairman Palladino, Feb. 12, 1985.

[190] On Dec. 31, 1984, the Commission's Office of Inspector and Auditor (OIA) submitted a report to the Commission involving an alleged material false statement by a Commission licensee in a proceeding before the Commission. OIA recommended against referral of this case to the Department of Justice and, on Jan. 23, 1985, Chairman Palladino proposed that no further action be taken on the matter. Three Commissioners subsequently approved that recommendation. On Mar. 1, 1985, Commissioner Asselstine advised the Director of OIA, Sharon Connelly, that, in his judgment, the matter should be referred to the Department of Justice. On Mar. 6, 1985, Chairman Palladino formally transmitted Asselstine's memorandum on the subject to the Director of OIA. Upon learning of this, the other three Commissioners, Roberts, Bernthal, and Zech, indicated that "until such time as the Commission modifies its clearly stated policy of delegating DOJ referral decisions to the Directors of OIA and OI, we believe the Directors of OIA and OI should be permitted to carry out their duties as they see fit, unencumbered by the interference or second-guessing of individual Commissioners. If the Commission, perhaps at the request of an individual Commissioner, wishes to take review of a referral decision by the Director of OIA or OI, we believe that review should be carried out on the record, by the full Commission, in consultation with the Office Director. As it is clearly inappropriate for an individual Commissioner to intervene at any time in a Director's decision to refer a matter to DOJ, so it also seems inappropriate for individual Commissioners to seek to reverse, without formal Commission review, Directors' decisions *not* to refer." Memorandum from Commissioners Roberts, Bernthal, and Zech, to Chairman Palladino, Mar. 12, 1985. On Mar. 14, 1985, the Director of OIA advised the Commission that it had come to her attention that a representative of the Commission's Office of Investigations had discussed the specific case involved here with the Department of Justice to determine whether DOJ wanted to pursue it. OIA was not advised of OI's discussion with DOJ, according to the Director of OIA.

[191] Memorandum from Chairman Palladino to Commissioners Roberts, Asselstine, Bernthal, and Zech, Mar. 21, 1985.

> —A specific case when a Commissioner requests consultation or referral.
>
> —An exceptional case which, in the opinion of OIA or OI, should be referred to DOJ only after consultation with the Commission.[192]

Palladino also proposed that:

> . . . OIA or OI should refer the following cases to Justice:
>
> —Any case which OIA or OI believes should be referred. (If, on items involving Commission consultation, the Commission majority or a Commissioner disagrees, then the referral letter should reflect this fact.)
>
> —Any case involving OIA or OI consultation with the Commission which a Commission majority believes should be referred.
>
> Finally, I would send to DOJ any case involving Commission consultation that a Commission minority believes should be referred.[193]

On March 29, both Commissioners Zech and Asselstine agreed with Chairman Palladino's proposal.[194] Zech specifically emphasized that he did not feel that the Commission should stand in the way of any referral which the Director of OI believes should be made. On April 1, 1985, Commissioner Roberts expressed the following view:

> I agree that the Directors of OIA and OI should continue to make decisions regarding referrals to the Department of Justice. However, I believe that both should be using the *same* criteria in making those decisions. It is not clear to me that is happening now. For that reason, I believe we should consider and adopt, as soon as possible, threshold criteria both for initiation of investigations and for referrals to DOJ. Until we have done that, I believe that we should be consulted on *all* OI referrals to Justice *before* a referral is made. Although I do not believe that we should impede any referral that the Director of OI believes should be made, this would make possible the transmittal of the Commission's or individual Commissioner's views with the referral. After we have considered and adopted threshold criteria for referrals, I would hope that the Commission itself would not have to be consulted on *every* referral by OI, but only on those types on which the Director of OI or the Commission desired consultation.[195]

On April 9, 1985, Commissioner Bernthal advised Palladino that he had "serious concerns" with Palladino's proposal.[196] Bernthal went on to say:

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[192] *Id.*

[193] *Id.*

[194] *See* Memorandum from Commissioner Zech to Chairman Palladino, Mar. 29, 1985, Memorandum from Commissioner Asselstine to Chairman Palladino, Mar. 29, 1985.

[195] Memorandum from Thomas M. Roberts to Chairman Palladino, Apr. 1, 1985.

[196] Memorandum from Commissioner Bernthal to Chairman Palladino, Apr. 9, 1985.

> I am astonished at the suggestion that an individual Commissioner should, as a matter of policy, be invited to refer to DOJ any matter of his choosing, even if OI or OIA decides the matter is not worthy of referral.[197]

On May 13, 1985, Ben Hayes sent a letter to the Department of Justice, asking for Justice's views on two matters:

> 1. Have we [OI] referred matters that *should not* have been referred?
>
> 2. Your comments as to the "threshoid for referral." [198]

On July 12, 1985, the Department of Justice responded to the two questions raised by Hayes:

> Our experience with your office does not indicate that there are matters which should not have been referred. Indeed, the matters referred by you have, with very few exceptions, merited further investigation by the Department. . . .
>
> Any referral threshold should, at a minimum, meet the standards set by federal law. Thus, for example, a referral threshold should require that any information, allegation or complaint, concerning possible criminal violations in matters under the NRC's administrative jurisdiction be expeditiously reported to the Department. . . .
>
> Finally, any referral threshold be construed liberally. In this area we rely heavily upon the NRC to report suspected wrongdoing. Therefore, in individual cases all doubts should be resolved in favor of referral to the Department.
>
> With these principles in mind we propose the following standards in making referrals to the Department of Justice:
>
>> First, whenever NRC receives any information, allegation, or complaint concerning or indicating possible criminal violation of federal statutes, regulations, orders or license conditions, it should promptly report that information, allegation or complaint to the Department. This rule should apply to all allegations of wrongdoing by NRC employees . . .
>>
>> Second, whenever NRC regulatory activities or proceedings including inspections, investigations, or audits, disclose that federal statutes, regulations, orders, or license conditions may have been willfully violated, that information should be promptly referred to the Department. A willful violation occurs where it is done deliberately or with a disregard of whether there was compliance with a particular statute, regulation, order or license condition. "Reasonable grounds" exist whenever any articulable facts could support an inference that a violation may have occurred. All doubts concerning whether a matter presents reasonable grounds to believe that a willful vio-

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[197] *Id.*

[198] Letter from Ben B. Hayes, Director, Office of Investigations, to Victoria Toensing, Deputy Assistant Attorney General, Criminal Division, Department of Justice, May 6, 1985.

> lation may have occurred should be resolved in favor of referral to the Department.[199]

On August 14, 1985, the Commission reached agreement on guidelines for OI and OIA referrals to the Department of Justice.[200] The guidelines approved by the Commission provided for the following approach to referrals:

> 1. OI/OIA will continue to make decisions regarding referrals to DOJ.
>
> 2. OI/OIA will consult with the Commission before making referral decisions in exceptional cases, which, in the opinion of OIA or OI should be referred to the DOJ only after consultation with the Commission. (Commissioners Roberts and Zech disagree because they would require OI consultation on all referrals until threshold criteria are adopted.)
>
> 3. OI will consult with the Commission before making referral decisions regarding:
>
> a. an alleged material false statement when in OI's opinion the allegation should be referred to DOJ; and
>
> b. a Commissioner requested referral or consultation.
>
> Commissioners Asselstine and Bernthal disagree with item 3 because they believe the Commission should not be involved in the referral process except as stipulated in item 2.
>
> 4. OI/OIA will refer to DOJ:
>
> a. Any case which OIA or OI believes should be referred as specified in items 1-3 above.
>
> b. Any case involving OI or OIA consultation which a Commission majority believes should be referred. When one or more Commissioner disagrees on items referred to the Commission the referral letter to DOJ should reflect this fact (Commissioners Bernthal and Zech dissent. Commissioner Bernthal does not believe that the Commission should be directly involved in the referral process. Commissioner Zech does not believe that this is necessary given item 1 and the promulgation of threshold criteria); and
>
> 5. Threshold criteria for initiation of investigations and for referrals to DOJ should be developed as a priority matter. Attention is invited to the Chairman's request in July 11 memorandum to Ben Hayes requesting the threshold criteria by the end of the month.
>
> 6. OI should consult with the Office of the General Counsel on proposed referral to DOJ.[201]

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[199] Letter from Victoria Toensing, Deputy Assistant Attorney General, Criminal Division, Department of Justice, to Ben B. Hayes, Director, Office of Investigations, Nuclear Regulatory Commission, July 12, 1985.

[200] Memorandum from Samuel J. Chilk, Secretary, Nuclear Regulatory Commission, to Sharon Connelly, Director, Office of Inspector and Auditor, and Ben Hayes, Director, Office of Investigations, Nuclear Regulatory Commission, Aug. 14, 1985.

[201] *Id.*

F. THRESHOLDS FOR THE INITIATION OF OI INVESTIGATIONS

Following the establishment of guidance on referrals to the Department of Justice, the Commission turned its attention to establishing a threshold for the initiation of investigations of OI. In addition, the Commission also considered the related question of establishing investigative priorities.

In response to the Commission's request of August 14, the Office of Investigations advised the Commission on August 26, 1985 of its views on the thresholds issue: [202]

> OI intends to approach the threshold issue in the following manner. All instances where there is a reasonable belief of wrongdoing should be referred to OI. Such referrals . . . would include instances of careless disregard or reckless indifference to NRC requirements. Matters not involving wrongdoing would normally neither be referred to nor accepted by OI for investigation. On receipt of a completed request form, OI would *initiate* an investigation if:
>
> (1) There is a reasonable basis to believe that the matter involves wrongdoing, and
>
> (2) the putative wrongdoing has implications of one or more of the following:
>
> (a) impact on the public health and safety, the common defense and security, protection of the environment, or anti-trust laws provided that these matters are within NRC jurisdiction
>
> (b) programmatic impact
>
> (c) character or integrity of key personnel to include all NRC licensed individuals (when this is the only implication, OI would seek Commission approval in accordance with current Commission guidance.) and
>
> (3) The Director, OI views the initiation of an investigation to be in the best interest of the NRC.[203]

On the issue of investigative priorities, OI indicated that it would take into account the requester's view of the priority to be afforded the investigation, the nature of the potential violation, and [whether] the event or conditions occurred or exist as alleged. OI further indicated that it would prioritize the investigation and place the investigation into one of the following categories:

> Priority A: Investigations of matters having immediate health and safety implications. Investigations where immediate investigation is required to prevent the destruction of evidence or that in any other way are time perishable.

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[202] Memorandum from Ben B. Hayes, Director, Office of Investigations, Nuclear Regulatory Commission, to Chairman Palladino, Aug. 26, 1986.

[203] *Id.*

> Priority B: Investigations initiated by Commission directive.
>
> Priority C: Investigations of nuclear plants in the Near-Term Operating License stage that do not fit into the above categories.
>
> Priority D: Investigations that do not have immediate health and safety inplications. Investigations having primarily programmatic impact.[204]

Following receipt of OI's views on the thresholds and priorities issue, Commissioner Roberts expressed the following perspective on the investigative function:

> I believe that the primary purpose of an OI investigation is to provide information to assist the Commission and its regulatory staff in making licensing and enforcement decisions. I also believe that an investigation should be initiated *only* where there is a *reasonable* basis for believing that a regulatory violation has occurred and that the violation was intentional or with careless disregard of regulatory requirements amounting to willfulness. An investigation should attempt to determine *whether* the violation occurred and was willful, but need not attempt to *prove* that it was willful or that it actually occurred. An NRC investigation should be terminated when *reasonable* leads are exhausted. It should not be continued as a 'fishing expedition' to see if anything useful turns up or go beyond the point necessary for *civil enforcement or licensing purposes.*[205]

Roberts further stated that Hayes' proposal established no criteria for termination of an investigation. He concluded with the following:

> OI's August 26 memorandum is not fully responsive to the [Commission] directive to develop, in coordination with the EDO, thresholds and priorities for initiation and termination of investigations. This task was to have been accomplished by mid-1985. Therefore I suggest that we direct OI to articulate in detail the criteria that it presently uses in deciding when to initiate and terminate an investigation and to explain why those criteria, with modifications if necessary, could not be used to define appropriate thresholds for initiation and termination of investigations. I also suggest that we direct OI to articulate in detail its basis for selecting and ranking its proposed priority categories and its criteria for placing an investigation in a particular category.[206]

On October 29, 1985, the Commission, with Commissioner Asselstine dissenting, directed OI to:

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[204] Id.

[205] Memorandum from Commissioner Roberts to Chairman Palladino and Commissioners Asselstine, Bernthal, and Zech, Sept. 6, 1985.

[206] *Id.*

> 1. articulate in detail the criteria that OI presently uses in deciding when to initiate and terminate an investigation;
> 2. explain why the criteria in 1. above, with modifications if necessary, could not be used to define appropriate thresholds for initiation and termination of investigations; and
> 3. articulate in detail OI's basis for selecting and ranking proposed priority categories and its criteria for placing an investigation in a particular category.[207]

On November 21, 1985, in SECY-85-369, the NRC staff submitted its recommendations on the thresholds and priorities issues to the Commission, with specific recommendations on guidance that should be followed by both the staff and OI in initiating investigations.[208] The staff indicated that the third prong of OI's three-pronged test for initiation of an investigation—that the Director, OI views the initiation of an investigation to be in the best interest of the NRC—appears to confer on OI broad discretion that "could limit the extent to which OI would accommodate the staff's need for information, particularly in cases where there was an indication of wrongdoing with health and safety consequences.[209] The staff also indicated, however, that:

> [T]he Director of OI has indicated that he only envisions the third criterion to be applicable when there is a lack of evidence available to support an allegation of wrongdoing. With this limitation and the procedures established in the July 5 Memorandum which provide that OI will notify the Staff within 30 days of a referral whether the matter has been accepted for investigation will be initiated, the Staff basically agrees with the threshold criteria established by OI.[210]

On the issue of priorities, the staff indicated that OI was agreeable to using the staff's proposed priority categories absent Commission objection to such an approach. Accordingly, "the Staff and OI recommend[ed] that the categories of high, normal and low. . . be used to establish priorities of cases for investigation." [211]

On January 10, 1986, the Commission, with Commissioner Asselstine dissenting, approved the proposed thresholds and priorities recommended by the staff, with a number of modifications.[212]

Shortly following that, Commissioner Asselstine advised the Commission that it had come to his attention that "at least one commissioner office is interpreting the [Commission's approval of the thresholds and priorities proposal of the staff] to be an abrogation of OI Policy 4 [permitting OI to initiate an investigation on its own initiative]." [213] After consulting with other Commissioners, the Secretariat of the Commission advised Commissioner Asselstine that:

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[207] Memorandum from Samuel J. Chilk, Secretary, Nuclear Regulatory Commission, to Ben B. Hayes, Director, Office of Investigations, Nuclear Regulatory Commission, Oct. 29, 1985.

[208] SECY-85-369, Thresholds and Priorities for Conducting Investigations, Nov. 21, 1985.

[209] *Id.*, p. 2.

[210] *Id.*

[211] *Id.*

[212] Memorandum from Samuel J. Chilk, Secretary, Nuclear Regulatory Commission, to Victor Stello, Jr., Acting Executive Director for Operations, and Ben B. Hayes, Director Office of Investigations, Jan. 10, 1986.

> Chairman Palladino, Commissioners Bernthal, Zech and you are in agreement that in voting on SECY-83-369 there was no intention to alter Policy 4 of the Office of Investigations so that the Director of OI may not begin an investigation on his own initiative.
>
> Commissioner Roberts has reaffirmed his vote on SECY-85-369. In his response to your question he indicated that he fully intended that his vote should be interpreted as repealing the authority of OI to initiate an investigation without the concurrence of either the Commission or its regulatory staff.[214]

On January 23, 1986, OI submitted to the Commission its response to the Commission's directive of October 29, 1985 (discussed above). OI indicated, in explaining the criteria currently used for initiating and prioritizing investigations that:

> There should be considerable congruity between this paper and [the staff's proposal in SECY-85-369 for thresholds and priorities] as both essentially address the same subject. To the extent that there is some variance between them, it is due primarily to (1) the fact that we were attempting to respond more precisely to the SRM, whereas SECY-85-369 was not prepared in response to the subject SRM, and (2) the fact that the OI paper is intended to depict OI procedures relating to the determination of thresholds and priorities rather than overall Agency procedures. We believe any substantive differences between the two documents to be minor and to be readily resolvable during the course of the continuing dialogue between the Staff and OI regarding investigative matters.[215]

On March 17, 1986, Commissioner Roberts, in the first of a series of memoranda raising questions about the conduct of investigations by OI, posed a series of questions about the basis for six cases under investigation.[216] In addition, Roberts indicated that he would like to know:

> [W]hat steps you [Ben Hayes] have taken, or plan to take, in concordance with the EDO, to assure yourself that a "Request for Investigation" contains sufficient information to support initiation of an investigation at the time it is initially submitted and that investigations are requested and initiated *only* when the guidelines approved by the

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[213] Memorandum from Commissioner Asselstine to Chairman Palladino and Commissioners Roberts, Bernthal, and Zech, Jan. 15, 1986.

[214] Memorandum from Samuel J. Chilk, Secretary, Nuclear Regulator Commission, to Commissioner Asselstine, Feb. 10, 1986.

[215] Memorandum from Ben B. Hayes, Director, Office of Investigations, to Samuel J. Chilk, Secretary, Nuclear Regulatory Commission, Jan 23, 1986.

[216] Memorandum from Commissioner Roberts to Ben B. Hayes, Director, Office of Investigations, Mar. 17, 1986.

> Commission are satisfied. I would also like to know when you plan to complete your assessment of the pending backlog of investigations using the approved guidelines. Only after such actions are completed can either you or the Commission accurately determine whether OI resources are adequate and being approximately used.[217]

OI submitted its response to Commissioner Roberts on May 6, 1986,[218] setting forth the basis for the six investigations questioned by Roberts and the procedures employed by OI to initiate and manage cases.

G. INVESTIGATIONS OF LICENSEE CHARACTER AND INTEGRITY

On May 30, 1986, Commissioner Roberts sent a memorandum to the other Commissioners,[219] indicating that he did not believe "OI was following the Commission's directives either in initiating investigations in general or in initiating investigations related to character/integrity of individuals in particular." [220] Roberts concluded with the following:

> Both of [the occurrences discussed] demonstrate to me that OI is not complying with the requirements established by the Commission for initiation of investigations. Whether that failure to comply is intentional or inadvertent is not obvious, but at best it indicates a lack of OI management attention to the Commission's directives. I suggest that Ben Hayes be directed to explain why OI does not follow the Commission's criteria for initiation of investigations and that he be informed that the Commission expects OI to follow its directives and him to assure that it does.[221]

In response to a suggestion from Chairman Zech, the Commission decided that it would be best to meet with Ben Hayes to discuss the concerns raised by Roberts.[222] On July 30, 1986, the Commission met with Hayes to discuss the various issues raised by Roberts, focusing primarily on OI's authority to initiate investigations into the charter and integrity of licensees and the Commission's role in approving these investigations in advance. On October 8, 1986, OI submitted its suggestions on how to handle character and integrity investigations to the Commission.[223] OI recommended that it seek Commission guidance only for those investigations where character would provide the sole reason for the investigation, as provided for in the Commission's existing policy governing

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[217] *Id.*

[218] Memorandum from Ben B. Hayes, Director, Office of Investigations, Nuclear Regulatory Commission, to Commissioner Roberts, May 6, 1986.

[219] Memorandum from Commissioner Roberts to Chairman Palladino and Commissioners Asselstine, Bernthal, and Zech, May 30, 1986.

[220] *Id.*

[221] *Id.*, p. 2.

[222] Memorandum from Samuel J. Chilk, Secretary, Nuclear Regulatory Commission, to Commissioner Roberts, July 10, 1986.

[223] SECY-86-294, Policy Regarding OI Consultation with Commission Prior to Initiating Investigations Involving Character of Individuals, Oct. 8, 1986.

OI's investigations.[224] On November 17, 1986, the Commission unanimously approved OI's recommendation.[225]

H. INVESTIGATION REFERRAL BOARD

On June 4, 1986, the Commission's Executive Director for Operations proposed that an Investigation Referral Board be established "to assure that priorities and schedules assigned to investigation requests to OI meet both individual program needs and agencywide regulatory needs." [226] The proposed IRB was intended to ensure:

> (1) that from an agencywide perspective we are only referring those cases to OI for which there is a regulatory need for the investigation and involve potential wrongdoing; and
>
> (2) that we are assigning priorities and schedules commensurate with the agency-wide need for investigation.[227]

On August 4, 1986, the proposal was formally submitted to the Commission for consideration and approval, with a recommendation that the IRB be established for a six-month trial period.[228] Following submission of the proposal, questions were raised regarding the justification for the proposed Board and, on August 6, 1986, the Commission directed the NRC staff to examine other alternatives.[229] On August 28, 1986, the NRC staff advised the Commission that:

> [The] central purpose in proposing the Board is to assure that there is a regulatory need for the investigation and that the assigned priority and schedule for each referral to OI reflect the agencywide need for the investigation. This determination cannot be made by a single Regional Administrator or Office Director because their knowledge of issues is generally associated with their individual office or regional activities.[230]

On September 24, 1986, Commissioner Asselstine expressed his strong objections to the proposal:

> I do not believe that there is a need for an investigation referral board as outlined by the EDO in his memoranda . . . The EDO could not explain to me what problem this board is supposed to address. He could not point to any particular examples of problems in setting priorities for investigations. It seems to me that if there really is a prob-

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[224] *Id.*, p. 5.

[225] Memorandum from Samuel J. Chilk, Secretary, Nuclear Regulatory Commission, to Ben B. Hayes, Director, Office of Investigations, Nov. 17, 1986. [Commissioners Asselstine and Bernthal would have preferred to have OI merely notify the Commission that it intends to begin an investigation.]

[226] Memorandum from James H. Sniezek, Deputy Executive Director, Regional Operations and Generic Requirements, Nuclear Regulatory Commission, to Office Directors and Regional Administrators, June 4, 1986.

[227] *Id.*

[228] Memorandum from Victor Stello, Jr., Executive Director for Operations, Nuclear Regulatory Commission, to the Commission, Aug. 4, 1986.

[229] Memorandum from Lando W. Zech, Jr., Chairman, to Victor Stello, Executive Director for Operations, Aug. 6, 1986.

[230] Memorandum from Victor Stello, Jr., Executive Director for Operations, to Lando Zech, Chairman, Aug. 28, 1986.

> lem with establishing an agency-wide schedule for investigations that could be solved simply by better coordination between the regions and headquarters staff and between the staff and OI, and that this board is unnecessary. . . . My main concern is that [the IRB proposal] appears to be a thinly veiled attempt by the EDO to control OI by controlling what referrals are made, and thus what OI investigates . . .[231]

On October 16, 1986, the Commission advised the staff of its decision to authorize the establishment of an IRB for a six month trial period.[232] On October 20, 1986, the IRB was established.

Following the six-month trial period, the Commission staff evaluated the IRB and concluded that it had "served its purpose of providing senior management oversight to the implementation of the Commission's guidance for the thresholds for requesting investigations and priorities of investigations." [233] Accordingly, the Staff recommended that the IRB be terminated. On June 30, 1987, the Commission approved the staff's recommendations.[234]

On September 15, 1987, the NRC staff established a more limited system for periodically prioritizing investigations, the Investigation Priority Review Group.[235] The Commission, as well as the Director of OI, indicated that they concurred in this decision.[236]

I. INVESTIGATIVE POLICIES PERTAINING TO THE AUTHORITY AND RESPONSIBILITY OF OI

On February 13, 1987, Commissioner Roberts raised a number of questions about the conduct of investigations by OI, focusing on the basis for certain investigations that had been opened by OI and a concern that OI had opened investigations solely for the purpose of perfecting a criminal case for referral to DOJ and not in furtherance of the Agency's mission.[237] Roberts concluded with the following recommendation for the Commission:

> I suggest that we direct Ben Hayes to explain why contrary to the representations made in his response to Commissioner's concerns about OI's view of its criminal investigative role, OI took the actions [described in this memorandum.] If these explanations are unsatisfactory I believe that we should seriously consider whether organizational and management changes are necessary to assure that OI functions as we intend it to function and that its activities are adequately supervised and controlled.[238]

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[231] SECY-85-369, Thresholds and Priorities for Conducting Investigations, Nov. 21, 1985.

[232] Memorandum from Lando W. Zech, Jr., Chairman, to Victor Stello, Jr., Executive Director for Operations, Oct. 16, 1986.

[233] Memorandum from Victor Stello, Jr., Executive Director for Operations, to the Commission, June 8, 1987.

[234] Memorandum from Samuel J. Chilk, Secretary, Nuclear Regulatory Commission, to Victor Stello, Jr., Executive Director for Operations, June 30, 1987.

[225] Memorandum from Victor Stello, Jr., Executive Director for Operations, to listed addressees, Sept. 15, 1987.

[236] Hearing of the Subcommittee on Nuclear Regulation on the Office of Investigations, Oct. 8, 1987.

[237] Memorandum from Commissioner Roberts to Chairman Zech and Commissioners Asselstine, Bernthal, and Carr, Feb. 13, 1987.

[238] *Id.*

On March 20, 1987, OI responded to the concerns raised by Roberts,[239] and, on April 7, 1987, proposed that the Commission reaffirm OI's authorities and responsibilities in order to clear up any confusion.[240]

On April 14, 1987, the Commission met to discuss a number of issues related to the Commission's investigative responsibilities, and reached the following decisions:

> . . . 2. The Commission notes the receipt of the recent paper from the Office of Investigations regarding OI's basic charter. Mr. Hayes will be scheduled for a Commission Management Meeting soon to discuss his paper and any other recommendations he may have. . . .
>
> 3. OGC is requested to review the policies and procedures for handling allegations involving Commissioners and their offices. This review should focus on the clarity of current procedures and what procedures and rules need further clarifications. . . .
>
> 7. The six-month trial period for the Investigation Referral Board (IRB) has elapsed. The EDO and the Director, Office of Investigations, should submit their views on how the IRB has operated during this period and whether it should be continued. [As discussed above, the IRB was subsequently abolished.] . . .
>
> 8. The Commission has decided to remove the mandatory requirement that referrals to DOJ be reviewed by OGC, but OI and OIA are urged to seek such review in normal circumstances.
>
> 9. The Commission has decided that it will no longer require consultation on Material False Statement issues prior to referral to DOJ. . . .
>
> 10. The Commission agreed that the Chairman would meet with Mr. Stello, Mr. Hayes, and Mrs. Connelly to discuss the necessity of working together in order to effectively carry out their responsibilities to the Agency and our country.[241]

On July 29, 1987, the Commission met with Ben Hayes to discuss the concerns that Commissioner Roberts had raised and OI's recommendation to reconfirm OI's authorities and responsibilities. On August 12, 1987, the Commission requested that the Director of OI consider the discussion at the July 29 meeting and, if OI feels that further Commission guidance is required, submit a new paper which specifically addresses any of the existing OI policy statements which require clarification.[242] On August 13, 1987, OI indicated that in view of the termination of the IRB, the EDO's agreement in principle to advise all NRC employees of their responsibility to inform OI promptly of alleged or suspected wrongdoing, and the announcement that Commission or OGC review of OI referrals to the Department of Justice would no longer be required, OI withdrew its proposal to reconfirm its authorities and responsibilities.[243]

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[239] Memorandum from Ben B. Hayes, Director, Office of Investigations, Nuclear Regulatory Commission, to the Commission, Mar. 20, 1987.

[240] SECY-87-93, Investigative Policies Pertaining to the Authority and Responsibility of the Office of Investigations, Apr. 7, 1987.

[241] Memorandum from Lando W. Zech, Jr., Chairman, Nuclear Regulatory Commission, to Ben B. Hayes, Director, Office of Investigations, Sharon R. Connelly, Director, Office of Inspector and Auditor, Nuclear Regulatory Commission, and others, Apr. 20, 1987.

[242] Memorandum from Samuel J. Chilk, Secretary, Nuclear Regulatory Commission, to Ben B. Hayes, Director, Office of Investigations, Aug. 11, 1987.

In the statement of managers accompanying the Continuing Resolution for fiscal year 1988 [244] Congress directed the Commission "to consolidate its inspection and examination organizations under the Executive Director in order to assure more efficient and cost effective utilization of staff resources." Pursuant to this statement of managers language, the Commission reorganized OI, effective February 1, 1988, so that it now reports to the Executive Director for Operations.[245]

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[243] SECY-87-093A, Investigative Policies Pertaining to the Authority and Responsibility of the Office of Investigations, Aug. 13, 1987.

[244] H.J. Res. 395 (Public Law 100-203).

[245] Letter from Lando W. Zech, Jr., Chairman, Nuclear Regulatory Commission, to John Breaux, January 29, 1988.

APPENDIX 3. AGENCY POLICY STATEMENTS

A. INTRODUCTION

In addition to the authority of the Nuclear Regulatory Commission to establish policy through the promulgation of rules and regulations, the issuance of orders, and the adjudication of cases, the Commission also relies on the use of statements of policy. The courts have declared that:

> A general statement of policy is the outcome of neither a rulemaking nor an adjudication; it is neither a rule nor a precedent, but is merely an announcement to the public of the policy which the agency hopes to implement in future rulemaking or adjudications. . . . A general statement of policy . . . does not establish a 'binding norm'. It is not finally determinative of the issues or rights to which it is addressed.[246]

As a general matter, policy statements have been employed by the Commission for the purpose of announcing agency guidance, generally of a procedural nature, rather than for imposing binding regulatory requirements on Commission licensees.[247]

According to Chairman Lando W. Zech, Jr., the following approach to policy statements has been taken by the Commission:

> Policy statements have been used by NRC to accomplish a wide range of objectives—for example, to establish a safety goal and to encourage plant standardization as well as to encourage industry initiatives. To be effective a policy statement must provide adequate guidance on what is expected, be based on an industry or program effort acceptable to NRC, be aggressively monitored and evaluated by NRC, and detail an effective enforcement policy. With these elements a policy statement can be effective to implement sound regulatory objectives, can be implemented more quickly than a rule, and can conserve government resources. It may be particularly useful in dealing with issues, such as training and maintenance, where a variety of approaches attuned to local conditions could have equal validity.[248]

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[246] *Pacific Gas & Electric Co.* v. *Federal Power Commission*, 506 F. 2d 33, 38 (D.C. Cir., 1974).

[247] For a complete list of policy statements promulgated or proposed by the Commission, see Part E of this Appendix.

[248] Testimony of Lando W. Zech, Jr., Chairman, Nuclear Regulatory Commission, before the subcommittee on Nuclear Regulation, hearing on the Nuclear Regulatory Commission's Regulatory Interface with Industry, Oct. 20, 1987.

With respect to the Commission's ability to require compliance with the policy set forth in a policy statement, the Chairman testified:

> With respect to its enforcement ramifications, a policy statement in and of itself provides guidance only and does not have the force and effect of law as does a rule. A person cannot be cited solely on that basis for not complying with a policy statement. But as I have already stated, whether or not a regulatory policy is set forth in a policy statement or in a rule, there is no effect at all on our authority to order corrective action. A policy statement may also give an indication of the circumstances under which the Commission might find it necessary to issue orders addressing safety issues.
>
> Because a policy statement is not adopted in accordance with the rulemaking procedures of the Administrative Procedure Act, it does not constitute or change regulatory requirements. Therefore, nothing in a policy statement limits the authority of the NRC to issue orders, call enforcement meetings, suspend licenses, or take other enforcement action when regulatory requirements are not met or a safety problem is found.[249]

As to the circumstances in which a policy statement rather than a rule will be issued, the Chairman stated:

> There are no set guidelines for determining whether a rule or a policy statement is more appropriate for dealing with a particular issue. The practical approach depends upon the circumstances of the individual case. A rule is more time-consuming to put into place than a policy statement. To some extent a rule may require more resources for development and to ensure compliance through monitoring and inspection. With a policy statement, the commission can monitor the progress toward certain goals while letting the licensee use a variety of approaches to achieve those goals. With the variety of utilities, plant designs, and regional characteristics in the United States, some flexibility in permitting licensees to developing varying approaches is frequently appropriate. [250]

Victor Stello, Jr., NRC's Executive Director for Operations (EDO), has summarized the nature of a policy statement, and the considerations underlying whether to rely on a policy statement rather than a regulation:

> The considerations used by the staff to decide whether a policy statement or a regulation will better meet a particular regulatory goal appear to be well understood.
>
> With respect to the question of the legal implications of issuing a policy statement instead of a regulation in a particular instance, the Office of the General Counsel advises that the essential difference between the two is the differ-

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[249] *Id.*

[250] *Id.*

> ent practical effect they have in subsequent administrative proceedings. Only a regulation has the force of law.
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> A policy statement may only announce what the NRC hopes to implement in future rulemaking or adjudications. The agency cannot apply or rely on a policy statement as law. When the NRC applies the policy in a particular case, it must be prepared to support its position with evidence and reasoning supporting its position as if the policy statement had never been issued.
>
> In contrast, a properly adopted substantive regulation establishes a standard of conduct that has the force of law. Licensees have an obligation to comply with the regulation, and failure to comply may be the basis for NRC enforcement action or an adverse decision in a licensing action. In proceedings involving a substantive regulation, the issue will be whether adjudicated facts conform to the regulation and whether the regulation should be waived or applied in the particular case. The underlying policy embodied in the regulation is not generally subject to challenge in individual proceedings before the agency (see 10 CFR 2.758).[251]

The EDO has identified the considerations affecting the Commission's decision to use policy statements rather than regulations as follows:

> 1. Issuing a policy statement is likely to be an effective course of action in the following situations:
>
> a. When the industry's past responses in a given area have shown a great degree of initiative.
>
> b. When the industry and the NRC share common goals.
>
> c. When the industry has shown the intent and ability to raise the overall level of safety in a given area, independent of individual licensees.
>
> d. When improving the level of public health and safety may be desirable but is not of undue concern.
>
> e. When, although some action may be warranted, there are no concerns about an immediate risk to public health and safety.
>
> f. When the issues involved are essentially related only to internal procedures.
>
> g. When the Commission wishes to disseminate information, clarify a position on an issue, or explain how a rule will be implemented.
>
> h. As a preliminary step in the resolution of complex issues. The policy statement may allow industry more flexibility to explore various ways to resolve an issue before a rule is issued.
>
> i. When the Commission wants to explain a response to a court decision and the courses of action the Commission expects to undertake.

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[251] SECY-88-131, COMLZ-87-55 Policy Statements versus Regulations, May 12, 1988.

2. Issuing a regulation is likely to be the appropriate course of action in the following situations:

   a. When the Commission requires specific enforcement capability.

   b. When there is concern about undue risk to public health and safety.

   c. When there is concern about immediate risk to public health and safety.

   d. When substantive issues are involved.

   e. When the agency must conform its regulations to enacted Federal legislation or when regulations the agency considers outmoded must be changed. (In these cases, issuing a regulation is the only appropriate course of action).[252]

More recently, the Commission has employed policy statements for the purpose of establishing broad guidance on a particular subject, with the development of specific programs to meet that guidance left to the initiative of individual utilities or, more commonly, to industry organizations, such as the Institute of Nuclear Power Operations or the Nuclear Management and Resources Council.[253] Where the Commission has determined that industry initiatives have proven to be effective in achieving the regulatory objectives established by the Commission, the Commission has, in turn, been willing to defer to such industry initiatives, rather than establishing a prescriptive regulatory program.

Those who have traditionally endorsed greater reliance on policy statements maintain that the wide range of reactor designs and operating practices simply does not lend itself to effective regulation through the promulgation of a prescriptive, industry-wide rule. Moreover, they argue that the promulgation of prescriptive regulatory requirements by the Commission results in licensees simply doing what is necessary to comply with those minimal regulatory requirements, rather than striving to achieve higher standards of performance. Critics of the Commission's reliance on policy statements maintain that the Commission is abdicatng its regulatory responsibility to the industry that it is charged with regulating, by opting for regulatory guidance that is unenforceable.

As part of the Subcommittee's inquiry into the Commission's use of policy statements, the Subcommittee examined three specific areas in which policy statements have been established or considered. A detailed discussion of those cases follows.

B. TRAINING AND QUALIFICATION POLICY STATEMENT

Section 306 of the Nuclear Waste Policy Act of 1982 [254] directed the Nuclear Regulatory Commission "to promulgate regulations, or other appropriate Commission regulatory guidance, from the training and qualifications of civilian nuclear powerplant operators, supervisors, technicians and other appropriate operating personnel."

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[252] *Id.*, at enclosure 1.

[253] For a more detailed discussion of the Institute of Nuclear Power Operations and the Nuclear Management and Resources Council, see Appendix 5.

[254] 42 U.S.C. 10226.

In addition, section 306 states that as part of the regulations or guidance, the Commission shall establish simulator training requirements for applicants for operator licenses and for operator requalification programs, requirements governing NRC administration of requalification examinations, requirements for operating tests at civilian nuclear power plant simulators, and instructional requirements for licensee personnel training programs. The Commission was given 12 months from the date of enactment, January 7, 1983, to establish such regulations or guidance.

On August 3, 1983, in a letter to Congress from Chairman Nunzio J. Palladino, the Commission proposed a revised schedule for promulgation of the regulations or guidance, extending by six months the one year Congress had originally allotted.[255]

On February 13, 1984, in SECY-84-76, the Commission staff submitted to the Commission for its consideration proposed rules in three areas: (1) training and qualifications for nuclear power plan operators, supervisors, technicians, and other appropriate operating personnel; (2) operator licenses; and (3) change of operator status.[256]

On February 24, 1984, in a public meeting before the Commission, the NRC staff briefed the Commission on SECY-84-76.[257] At that same meeting, industry representatives explained in detail the initiatives that the industry had undertaken to improve training of key personnel at nuclear power plants. The industry representatives went on to identify a number of concerns about the proposed rule recommended by the staff. Dennis Wilkinson, the then-President of INPO, summarized the industry position:

> I sincerely believe that the proposed regulations now under development and consideration by the NRC pose a significant threat to industry's self-improvement activities. Before you proceed along that path, you should have a clear understanding of the probable impact. . . . NRC staff's proposed regulations in training and General Operating Criteria overlap and duplicate nearly every major program of INPO. If you proceed with them, these proposed regulations will impact the industry initiative in self-improvement to a far greater extent than you might imagine. INPO will not be allowed to do its job because utility resources will be committed, by necessity, to assuring compliance with the additional regulations. And the march to excellence will give way to meeting what is specified and required.[258]

Wilkinson concluded by quoting from the Report of the President's Commission on the Accident at Three Mile Island (the "Kemeny Report"):

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[255] Letter from Nunzio J. Palladino, Chairman, Nuclear Regulatory Commission, to the Honorable Alan K. Simpson, Chairman, Subcommittee on Nuclear Regulation (Aug. 3, 1983).

[256] SECY-84-76, Proposed Rulemaking for Operator Licensing and for Training and Qualifications of Civilian Nuclear Power Plant Personnel, Feb. 13, 1984.

[257] Commission Meeting on the Need for and Availability of Experienced Reactor Operators for Future Nuclear Power Plants, February 24, 1984.

[258] *Id.*, transcript at p. 77.

> The existence of a vast body of regulations by NRC tends to focus industry attention narrowly on the meeting of regulations rather than on a systematic concern for safety. Furthermore, the nature of some of the regulations may in some instances have served as a deterrent for utilities or their suppliers to take the initiative they should in proposing measures for improved safety.[259]

In view of these concerns, the industry representatives asked the Commission to defer action on the staff's proposal until the industry had the opportunity to present an alternative position based on industry and INPO initiatives. In response, Chairman Palladino indicated that the Commission would want to discuss the concerns that had been raised by the industry representatives in further detail with the staff before proceeding.

Following a series of meetings with the Commission staff, industry representatives met again with the Commission on April 9, 1984, in a public meeting.[260] At that meeting, the Nuclear Management and Human Resources Committee (NUMARC) presented the industry's detailed views on SECY 84-76. NUMARC endorsed the proposed regulations for operator licensing, but took the position that on the training and qualification issue, the Commission should issue a generic letter to licensees noting that all have committed to the INPO training and qualification programs, finding that such programs ensure that training meets high standards of quality and effectiveness, and indicating that if universal utility participation and support of these INPO programs is at any time not maintained, remedial action by the Commission in the form of rulemaking or orders will be undertaken.

In support of this approach, the NUMARC representatives argued that the specific language of section 306, calling for "regulations *or other appropriate Commission regulatory guidance*" (emphasis added), confers on the Commission the discretion to approve a generic letter of the type that they proposed, as an alternative to imposing prescriptive regulatory requirements. In short, NUMARC argued, the generic letter would satisfy the requirements of the statute and, at the same time, not undermine the INPO initiatives.

At the conclusion of the April 9th meeting, the Commission indicated that it would consider the industry's proposal and that a response would be forthcoming.

On June 9th, the Commission staff submitted an alternative to the training and qualifications portions of the proposed rule, prepared in response to NUMARC's proposal.[261] Among others things, the revised staff proposal, SECY 84-76A, sought to clarify the role of accreditation by stating that an NRC-endorsed accreditation program would be the expected means of meeting the requirements of the rule. The proposal noted that the INPO-managed Accreditation Program is NRC-endorsed. The staff went on to state:

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[259] *Id.* p. 98.

[260] Briefing by the Industry on Industry Initiatives in Non-Hardware Areas, Apr. 9, 1984.

[261] SECY-84-76A, Alternative to Proposed Rulemaking for Training and Qualifications of Civilian Nuclear Power Plant Personnel (SECY-84-76), June 20, 1984.

> In developing these revisions, the staff was guided by a memorandum from the Executive Legal Director which indicates that "Section 306 directs NRC to impose certain mandatory requirements" and, further, that rulemaking is the best of three available alternatives to mandating requirements. In view of this memorandum, the staff considered ways of clarifying the role of the INPO-managed Accreditation Program to meet the requirements of Public Law 97-425, Section 306, while maintaining the NRC's basic authority to regulate training.[262]

On June 22, 1984, the Commission held a third public meeting with industry representatives, for the purpose of a general briefing by NUMARC and INPO on the status of various industry initiatives, including, but not limited to, the training and qualification issue.[263] At the meeting, the NUMARC and INPO representatives reiterated their concern about the training and qualification rulemaking initiative.

On June 26, 1984, the Commission met with both the agency staff and industry representatives, again in a public meeting, to discuss SECY 84-76A.[264] At that meeting the Commission's Executive Legal Director, Guy H. Cunningham, III, once again advised the Commission that:

> Section 306 requires that we come up with some form of mandatory requirements for licensees, whether that be in the form of regulation, license, conditions, individual orders.[265]

Commissioner James K. Asselstine, who had served as Associate Counsel for the Subcommittee on Nuclear Regulation of the Committee on Environment and Public Works when section 306 was drafted, responded as follows:

> I don't quarrel with the analysis you've done, but I think you put a bit too much emphasis on the word "requirement" than is justified, at least given my knowledge of the provision. My recollection of what people really had in mind here was to closely track the approach that was laid out in the TMI action plan, which referred to a combination of regulations in some areas, reg guides in others, one or the other, or a combination of the two. . . . I think there's some flexibility if we wanted to use it, to follow an approach that's short of a regulation or license condition.[266]

As a result of the June 26th meeting, and in view of serious concerns about the potential of undermining INPO's training program, the Commission directed the staff to reevaluate the proposed rule. Accordingly, on August 2, 1984, William J. Dircks, NRC's Executive Director for Operations, advised the Commission that the staff intended to conduct discussions with INPO and NUMARC on the training and qualification issue, as well as the Commission's Fitness for Duty initiative dealing with drug and alcohol use by licensee employees.[267]

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[262] *Id.*, p. 3.

[263] NUMARC briefing on Readiness to Operate, June 22, 1984.

[264] Briefing on Proposed Rule-making on Operator Licensing and Qualification of Plant Personnel; Staff Reaction to Industry Proposals, June 26, 1984.

[265] *Id.*, transcript at p. 21.

[266] *Id.*, transcript at p. 23.

On August 22, 1984 a meeting of senior officials of the NRC, NUMARC, and INPO was held to discuss the effects of NRC rulemaking generally on the efforts of NUMARC and INPO. At that meeting, NRC reiterated its support for the industry to take the lead in developing training guidance and encouraged the industry to accept the Commission offer to leave implementation of this general rule to the industry. The industry representatives stated their belief that any rulemaking or other form of mandatory requirement undermines the voluntary efforts of the industry. According to Dircks, "NUMARC reiterated their stand that a Generic Letter or Commission Policy Statement endorsing accreditation without establishing enforceable requirements is the only acceptable response to P.L. 97-425, section 306 for the industry." [268]

NUMARC representatives subsequently met on August 28, 1984 to develop a position on their future efforts. On August 29, 1984, Warren Owen telephoned Dircks on behalf of NUMARC to communicate NUMARC's position and, according to Dircks, advised him "that it would be NUMARC's policy to reevaluate the industry's commitment to continue the INPO accreditation program if there is an NRC training regulation of any kind." [269] On September 4, 1984, Dircks set forth NUMARC's position in a memorandum to the Commission.[270]

On September 6, 1984, the staff presented a revised training and qualifications rule to the Commission (SECY 84-76B), reflecting recommendations that Chairman Palladino had made as a result of the June 26th meeting ("Alternative I").[271] In addition, in response to concerns expressed by industry representatives, the staff proposed a simplified version of the training rule initially proposed in SECY 84-76A ("Alternative II"). The staff also submitted an analysis of a proposal that Commissioner Asselstine had made on August 3 to eliminate the training rule and, instead, rely on a broad performance-based qualifications rule. The staff's analysis did not support Commissioner Asselstine's proposal.

Following an analysis of the two principal alternatives, the staff recommended that:

> Based on the NRC legal staff's previous opinion that some sort of requirement must be promulgated in response to Section 306 of P.L. 97-425 and in view of the high degree of interest and controversy surrounding this issue, the staff recommends that both alternatives be published for public comment. Although the staff clearly favors the proposed Alternative II, it recognizes that publication of

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[267] [cite] For a more detailed discussion of the Fitness for Duty issue, see Part C of this Appendix.

[268] SECY-84-348, Effects of NRC Rulemaking Activities on Industry Self Improvement Efforts of NUMARC and INPO, Sept. 4, 1984, p. 2.

[269] *Id.*

[270] *Id.*

[271] SECY-84-76B, Rulemaking for Training and Qualifications of Civilian Nuclear Power Plant Personnel, Sept. 6, 1984.

> two versions could expedite the rulemaking process and allow the public to voice their opinion on both approaches.[272]

On October 12, 1984, the Commission met again with representatives of NUMARC, in a public meeting, to discuss the proposed training and qualifications rules.[273]

In view of the concerns expressed by industry and others, and in recognition of the initiatives then underway at INPO, the Commission decided in October of 1984 to establish a policy statement, rather than a regulation, on the issue of training and qualification of nuclear power plant personnel.[274] The Commission unanimously approved the "Commission Policy Statement on Training and Qualification of Nuclear Power Plant Personnel" in February of 1985.[275] Under the policy statement, the Commission announced the following approach to training and qualifications:

> Subject to the continued success of INPO programs and NRC's ability to monitor their effectiveness, the Commission will refrain from new rulemaking in the area of training for a minimum period of two years from the effective date of this Policy Statement. While the Commission is deferring rulemaking in this area in recognition of the industry efforts to date, the NRC can only exercise this flexibility as long as the industry programs produce the desired results. It remains the continuing responsibility of the NRC to independently evaluate applicants' and licensees' implementation of improvement programs to ensure these results are achieved and to evaluate the possible need for further NRC action based on the success of industry programs after a two-year period.[276]

The Commission published its policy statement on training and qualifications of nuclear power plant personnel on March 20, 1985.[277] Although the policy statement endorsed INPO's training program, the Commission also directed its staff to independently evaluate applicants' and licensees' implementation of improvement programs and, specifically, the industry's commitment to have ten training programs at 61 reactor sites "ready for accreditation" by December 31, 1986.

In May of 1987, after conducting a review of the results of the two-year trial period, the Commission staff found that the industry had satisfied its earlier commitment to have training programs in ten specific areas ready for accreditation at each of 61 reactor sites by December 31, 1986.[278] In addition, the staff reached the following conclusions:

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[272] *Id.*, p. 3.

[273] NUMARC Briefing on Fitness for Duty, Training and Requirements for Senior Managers, Oct. 12, 1984.

[274] Memorandum from Samuel J. Chilk, Secretary, Nuclear Regulatory Commission, to William J. Dircks, Executive Director for Operations, Herzel H.E. Plaine, General Counsel, and John E. Zerbe, Director, Office of Policy Evaluation, Nuclear Regulatory Commission, Oct. 24, 1984.

[275] Memorandum from Samel J. Chilk, Secretary, Nuclear Regulatory Commission, to William J. Dircks, Executive Director for Operations, and Herzel H.E. Plaine, General Counsel, Nuclear Regulatory Commission, Feb. 15, 1985.

[276] *Id.*

[277] 50 Federal Register 11147 (1985).

> Significant progress is being made by industry in improving training and implementing the Commission's Policy Statement. While significant training improvements have been observed, training deficiencies and weaknesses have been identified through staff inspection and review activities in both accredited and nonaccredited training programs. Deficiencies of the type identified are to be expected given the magnitude of the effort involved and the difficulty in implementing performance-based concepts by an industry that until recently based training on NRC-specific requirements. The transition process has been complicated by questions regarding the differences between NRC and INPO review standards and criteria and by some utility uncertainty about how to meet NRC requirements and still meet INPO's accreditation criteria. On balance, however, the industry's efforts to date to improve training have been successful.[279]

Accordingly, the staff recommended that the Commission endorse the industry accreditation program and continue to defer rulemaking. The staff also recommended continued evaluation of this industry program and further discussions with INPO management to explore expanding the scope of accreditation in several areas such as accrediting the training and qualifications of contractor personnel.

On April 12, 1988, the Commission's Advisory Committee on Reactor Safeguards endorsed the staff's recommendation, indicating that it was of the opinion that:

> [T]he training and accreditation program of the industry and the Institute of Nuclear Power Operations has been highly successful in establishing effective training programs for the personnel responsible for the operation of nuclear power plants. . . . We encourage continuation of the INPO-management accreditation program and believe it is unnecessary for the NRC to consider rulemaking related to this issue.[280]

On July 7, 1987, the Commission approved the staff's recommendation to defer rulemaking for an additional two-year period, noting that "the staff should also ensure that sufficient staff resources are allocated to continue the oversight of the industry training efforts as discussed in the original policy statement." [281]

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[278] SECY-87-121, The 2-Year Evaluation on Implementation of the Commission Policy Statement on Training and Qualification, May 11, 1987.

[279] *Id.*, pp. 4-5.

[280] Letter from W. Kerr, Chairman, Advisory Committee on Reactor Safeguards, to Lando W. Zech, Jr., Chairman, Nuclear Regulatory Commission, Apr. 12, 1988.

[281] Memorandum from Samuel J. Chilk, Secretary, Nuclear Regulatory Commission, to Victor Stello, Jr., Executive Director for Operations, Nuclear Regulatory Commission, July 7, 1987.

FITNESS FOR DUTY POLICY STATEMENT

On May 18, 1982, as a result of a substantial increase during the previous three years in the number of reported drug-related incidents in which nuclear power plant licensee or contractor employees were arrested or terminated,[282] the Nuclear Regulatory Commission staff recommended to the Commission that a regulation be promulgated to address the drug and alcohol problem for those personnel with unescorted access to protected areas at nuclear power plants.[283] The rule proposed by the staff would require licensees to establish, document, and implement adequate written procedures designed to ensure that personnel with unescorted access to protected areas are not under the influence of drugs or alcohol or not otherwise unfit for duty. In addition, under the rule "each licensee will develop procedures which take into consideration not only fairness to and due process for its employees but also any conditions or circumstances unique to its facility." [284]

The proposed rule was approved by the Commission and published for comment on August 5, 1982.[285] On August 15, 1983, after reviewing the comments received on the proposed rule, the staff recommended to the Commission that a final rule be promulgated.[286] The staff emphasized that:

> [T]he rule is broadly worded in keeping with the belief that each licensee should establish specific procedures and techniques for determining fitness for duty (e.g., breath testers, psychological tests) taking into consideration circumstances unique to its facility.[287]

On December 12, 1983, the Commission advised the staff that the rule should be expanded to cover escorted, as well as unescorted, personnel.[288] In addition, the Commission indicated that it believed the rule should apply to NRC employees who are otherwise authorized access. Finally, the Commission indicated that:

> [The Commission is also concerned whether licensees will be able to specify details in the procedures required by this rule. If the licensees are to be required to develop and implement written procedures to carry out the intent of the rule, NRC will also have to develop guidelines as to what is or is not acceptable implementation on the part of the licensees. An alternative to requiring written procedures is the FAA approach (as proposed by Commissioner Gilinsky) prohibiting personnel access to plant vital areas while under the influence of alcohol or drugs or otherwise

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[282] *See, e.g.*, IE Information Notice No. 82-05: Increasing Frequency of Drug-Related Incidents, Mar. 10, 1982.

[283] SECY-82-196, Proposed Rulemaking Requiring Fitness for Duty for Personnel with Unescorted Access to Protected Areas, May 18, 1982.

[284] *Id.* p. 2.

[285] 47 Federal Register 33980 (Aug. 5, 1982).

[286] SECY-85-339, Final Rulemaking Concerning Fitness for Duty for Personnel with Unescorted Access to Protected Areas, Aug. 15, 1983.

[287] *Id.*, p. 2.

[288] Memorandum from Samuel J. Chilk, Secretary, Nuclear Regulatory Commission, to William J. Dircks, Executive Director for Operations, Nuclear Regulatory Commission, Dec. 12, 1983.

> unfit for duty, leaving the method of carrying out the rule up to the licensee. Commissioner Gilinsky felt that the staff was over complicating the problem and weakening the rule by concentrating on procedure instead of fitness for duty itself.[289]

Accordingly, the staff was directed to examine these various issues and resubmit a proposal to the Commission, modified accordingly. On March 15, 1984, the staff submitted a revised final rule, expanding the coverage of the earlier proposed rule to include personnel with both escorted and unescorted access.[290] The staff examined the FAA criterion-based approach recommended by Commissioner Gilinsky, but indicated that it continued to believe that the rule should be broadly worded and procedures-based, to permit licensees, rather than the NRC, to identify specific procedures for determining and responding to the fitness for duty requirements. The staff noted that the Edison Electric Institute (EEI), an industry organization, had already published guidelines for preparing licensee procedures in response to the proposed rule and that, in the staff's judgment, it would be appropriate to use the EEI document as a basis for reviewing licensee procedures pertaining to alcohol and drugs.

On July 9, 1984, the Commission, by a 4-0 vote, approved publication of the revised final rule.[291] The Commission also directed the staff to prepare a generic letter to all licensees providing a general description of how the NRC will determine compliance with the rule and to explore with INPO and NUMARC their willingness to undertake the development of detailed program elements and acceptance criteria for a fitness for duty program. The Commission indicated that if NUMARC and INPO were willing to develop these items, then the Commission would be prepared to allow them to take the lead in lieu of further development by NRC of prescriptive guidance. The Commission determined that the final rule should take effect 30 days after issuance of the staff's generic letter.[292]

On August 22, 1984, senior officials of the NRC, NUMARC, and INPO met to discuss the effects of the NRC fitness for duty rulemaking on the efforts of NUMARC and INPO.[293] At the meeting, the NRC officials reiterated the Commission's support for the industry to take the lead in developing guidance for fitness for duty programs. The industry representatives stated that NRC rulemaking activities could have a significant negative impact on industry support of NUMARC and INPO.

The NUMARC Steering Committee subsequently met on August 28, 1984, to develop a position on their future efforts in both the fitness for duty and training areas. The next day, on behalf of NUMARC, Warren Owen advised William J. Dircks, then NRC's

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[289] *Id.*

[290] SECY-83-339A, Additional Information Regarding Final Proposed Fitness for Duty Rule (SECY-83-339), Mar. 15, 1984.

[291] Memorandum from Samuel J. Chilk, Secretary, Nuclear Regulatory Commission, to William J. Dircks, Executive Director for Operations, Joseph J. Fouchard, Director, Office of Public Affairs, and Carlton Kammerer, Director, Office of Congressional Affairs, July 9, 1984.

[292] *Id.*

[293] The industry and NRC representatives also discussed the training and qualification issue at this same meeting. For a detailed discussion of that issue, see Part B of this Appendix.

Executive Director for Operations, of NUMARC's position: NUMARC would be willing to develop guidance for licensee fitness for duty programs only under the condition that the NRC would not promulgate a fitness for duty rule.[294]

On September 11, 1984, Commissioner Roberts advised the other Commissioners that:

> [Fitness for Duty] is an area where NRC has no special expertise or statutory mandate. It seems to me that, since the industry has developed guidance for thier drug and alcohol programs which the NRC staff has accepted (SECY-83-339) and that as NUMARC has stated, approximately 85% of the current nuclear plants have Fitness for Duty programs in place, the NRC Fitness for Duty Rule is not needed.[295]

Roberts then went on to recommend the following approach:

> 1. That the Commission's rule be held in abeyance for approximatley two years, provided that the industry's effort to develop additional procedures and acceptance criteria and to implement the expanded program proceeds on a schedule acceptable to the Commission.
>
> 2. That the Commission issue a Policy Statement and require periodic (quarterly) reports to the Commission concerning the NUMARC/INPO's success in implementing the program. An annual briefing on this issue by NUMARC should be required with a staff (IE) evaluation of the effectiveness of the INPO program at the end of two years.
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> 3. That, if the above is not successful, the Commission be prepared to issue the previously prepared rule with a short period of time for implementation (two years from now everyone should be on notice to have a Fitness for Duty program in place).[296]

On October 12, 1984, representatives of NUMARC and INPO briefed the Commission, in a public meeting, on their position on the fitness for duty initiative.[297] In response to that meeting, the commission directed the staff to provide further justification for the fitness for duty rule.

On October 17, the staff discussed with the Commission the status of the fitness for duty rulemaking and the position of INPO and NUMARC on this intivative.[298] During that meeting, a consensus emerged among the Commissioners to direct the staff to develop a policy statement, rather than a regulation, on the fitness for duty issue. The policy statement would set forth the objectives to be achieved and allow INPO to develop the detailed reqirements to achieve those objectives. If an acceptable approach could be fashioned, NRC would defer rulemaking for at least two years to allow the utility industry to develop fitness for duty programs.

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[294] *See* SECY-84-76B, Rulemaking for Training and Qualifications of Civilian Nuclear Power Plant Personnel, Sept. 6, 1984, and SECY-84-348, Effects of NRC Rulemaking Activities on Industry Self Improvement Efforts of NUMARC and INPO, Sept. 4, 1982, for a discussion of what transpired in the August 22 and August 28 meetings and the Dircks-Owen telephone converation.

[295] Memorandum from Thomas M. Roberts to Chairman Palladino and Commissioners Asselstine, Bernthal, and Zech, Sept. 11, 1984.

[296] *Id.*

[297] NUMARC Briefing on Fitness for Duty, Training and Requirements for Senior Managers, Oct. 12, 1984.

[298] Discussion with Staff on Fitness for Duty, Training, and Requirements for Senior Managers, Oct. 17, 1984.

The staff was directed to coordinate development of the policy statement with INPO and NUMARC, but at the same time to ensure that the policy statement would give the Commission the mechanism to ensure that the nuclear power plants are being operated safely.[299] In this regard, Commissioner Asselstine requested a legal analysis of the extent to which the Commission can take enforcement action, on a case-by-case basis, under a policy statement, as opposed to a regulation.[300]

The staff developed a proposed policy statement and, in accordance with the Commission's instructions, forwarded the policy statement to Warren Owen, Vice Chairman of NUMARC, for review and comment on November 19, 1984.[301] Following meetings and discussions between NUMARC representatives and the NRC staff, NUMARC submitted its final comments on the proposed policy statement on January 10, 1985.[302]

On January 17, 1985, the staff submitted to the Commission a proposed policy statement of fitness for duty for Commission approval.[303] The policy statement stated that:

> To provide reasonable assurance that all nuclear power plant personnel working in vital areas at operating plants are fit for duty, licensees and applicants will develop and implement fitness for duty programs in accordance with guidelines developed by the industry. The guidelines will be provided to the NRC for review and comment. It remains the continuing responsibility of the NRC to independently evaluate applicant development and licensee implementation of fitness for duty programs to ensure that desired results are achieved. Nothing in this Policy Statement limits NRC's authority or responsibility to follow up on operational events or its enforcement authority when regulatory requirements are not met. However, while evaluating the effectiveness of this guidance, the NRC intends to exercise discretion in enforcement matters related to fitness for duty programs for nuclear power plant personnel and refrain from new rulemaking in this area for a period

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[299] Memorandum from Samuel J. Chilk, Secretary, Nuclear Regulatory Commission, to William J. Dircks, Executive Director for Operations, Herzel H.E. Plaine, General Cousel, and John E. Zerbe, Director, Office of Policy Evaluation, Nuclear Regulatory Commission, Oct. 24, 1984

[300] *Id.*

[301] Letter from William J. Dircks, Executive Director for Operations, Nuclear Regulatory Commission, to Warren Owen, Vice Chairman, NUMARC, Nov. 19, 1984. The draft policy statement forwarded to NUMARC also included a policy statement on training and qualifications. Following several discussions with NRC staff, NUMARC recommended, and NRC concurred, that the fitness for duty and training issues should be addressed in separate policy statements. *See, e.g.*, letter from W.H. Owen to William J. Dircks, Executive Director for Operations, Nuclear Regulatory Commission, Dec. 14, 1984.

[302] Letter from W.H. Owen to William J. Dircks, Executive Director for Operations, Nuclear Regulatory Commission, Jan. 10, 1984 [sic].

[303] SECY-85-21, Policy Statement on Fitness for Duty of Nuclear Power Plant Personnel, Jan. 17, 1985.

> of at least two years from the effective date of this Policy Statement.[304]

In April, the staff forwarded a separate paper to the Commission, recommending that the earlier notice of proposed rulemaking be withdrawn, in view of the Commission's intention to proceed with the issuance of a policy statement.[305] Chairman Palladino requested that action on SECY 85-21A be deferred until the Commission completed action on the policy statement proposed in SECY 85-21.[306]

By May 9, 1985, all five Commissioners had voted on SECY 85-21 and, by a vote of 3-to-2, approved the policy statement.[307] Upon review of the comments of the other Commissioners, however, Chairman Palladino determined that additional discussion would be appropriate, particularly for the purpose of addressing remarks by Commissioner Bernthal with regard to what, precisely, the Commission was expecting of the industry under the proposed policy statement. Bernthal had proposed, for example, that the policy statement contain a clear statement of the Commission's expectation that industry exert best efforts to ensure that a fitness for duty program is a place by the end of the two year period. Accordingly, Palladino requested that final action on SECY 85-21 be held in abeyance, pending that discussion.[308]

On June 3, 1985, the NRC staff requested that the Commissioners delay any further action on the fitness for duty policy statement, in view of the experience with drug-related problems that had arisen at the Palo Verde nuclear plant.[309] On June 17, 1985, EEI provided the NRC staff a modified industry guide for comment that, according to industry representatives, reflected the experience gained from the Palo Verde case.[310]

On July 3, 1985, NUMARC reported to the NRC that, in anticipation of the issuance of the policy statement, the industry had carried out various commitments that it had made earlier, based upon the understanding that a policy statement would be forthcoming from the Commission. For example, NUMARC advised the Commission that every nuclear utility had implemented a basic fitness for duty program; that EEI had revised its *EEI Guide to Effective Drug and Alcohol Policy Development* and reissued it to the industry; and that INPO had strengthened its evaluation of utility implementation of fitness for duty programs and, between October 17, and July 1985, conducted evaluations at over 30 utilities and made recommended changes where needed.[311]

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[304] *Id.*

[305] SECY-85-21A, Withdrawal Notice: Fitness for Duty of Nuclear Power Plant Personnel, Apr. 12, 1985.

[306] Memorandum from Andy Bates to Mariz Lopez-Otin, Spiros Droggitis, Ken Cohen, and David Humenansky, May 15, 1985.

[307] Memorandum from Phil Polk, Technical Assistant for Nunzio J. Palladino, to Samuel J. Chilk, Secretary, Nuclear Regulatory Commission, undated.

[308] *Id.*

[309] Memorandum from William J. Dircks, Executive Director for Operations, Nuclear Regulatory Commission, to the Commission, June 3, 1985.

[310] *See* SECY-85-21B, Fitness for Duty of Nuclear Power Plant Personnel, Aug. 26, 1985.

[311] Letter from J.H. Miller, Jr., Chairman Steering Committee, NUMARC, to William J. Dircks, Executive Director for Operations, Nuclear Regulatory Commission, July 3, 1985.

NUMARC also reported that EEI was planning to sponsor a fitness for duty workshop later in the year. NUMARC stated to the Commission that it was committed to fitness for duty programs that have substance in all areas, including off-site drug use, but that the Commission's delay in issuing the policy statement could undermine the industry's commitment in the area of fitness for duty.[312]

NRC provided its comments to EEI on EEI's modified industry guide on July 16, 1984, noting that there are "many areas where the document could be expanded or revised to improve its completeness and specificity as a comprehensive guidance document for industry." [313] In the process of formulating comments on the document, the NRC staff had also received comments from the Commission's Office of Investigations that were sharply critical of the guide.[314]

On August 26, 1985, the NRC staff provided additional information to the Commission regarding NUMARC's proposed fitness for duty program.[315] In this paper, the staff recommended that the Commission approve the fitness for duty policy statement originally submitted to the Commission in January of 1985. The staff noted that the industry guide has been clarified in a manner that addresses earlier concerns expressed by individual Commissioners with regard to the staff's proposed policy statement. Two cautionary notes, however, were made by the staff:

> (1) It should be recognized that with a Policy Statement there is not as clear cut a basis for regulatory action as with a rule.
>
> (2) It should be noted that the staff's limited oversight role and the lack of detailed program requirements in the EEI guidance are such that the staff will not necessarily be in a position to have specific information or a basis for high confidence in the adequacy of fitness for duty programs at specific sites.[316]

Following the submission of SECY 85-21B, and in response to questions raised by both the Commissioners Asselstine [317] and Bernthal about the enforceability of a policy statement, the NRC staff provided the Commission its opinion on the enforcement issue in a memorandum of September 27, 1985:

> A policy statement does not by itself expand the Commission's enforcement authority or provide any additional bases for enforcement action. Because it is not adopted in accordance with the rulemaking procedures of the Administrative Procedure Act, a policy statement may not affect

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[312] *Id.*

[313] Letter from James M. Taylor, Director, Office of Inspection and Enforcement, Nuclear Regulatory Commission, to Carl D. Behnke, Vice President, Human Resources Management, Edison Electric Institute, July 16, 1985.

[314] Memorandum from Ben. B. Hayes, Director, Office of Investigations, Nuclear Regulatory Commission, to James M. Taylor, Director, Office of Inspection and Enforcement, Nuclear Regulatory Commission, July 1, 1985.

[315] SECY-85-21B, Fitness for Duty of Nuclear Power Plant Personnel, Aug. 26, 1985.

[316] *Id.*

[317] Memorandum from James K. Asselstine, Commissioner, to Herzel H.E. Plaine, General Counsel, Nuclear Regulatory Commission, Sept. 25, 1985.

> substantive obligations; rather, it serves as a statement of purpose or future intent to deal with an issue in a particular way.
>
> As was noted in the Policy Statement of Training and Qualification, however, nothing in the policy statement limits the authority of the Commission to issue orders, call enforcement meetings, suspend licenses or take other enforcement action when regulatory requirements are not met or a safety problem is found. However, NRC has no specific requirements which require licensee personnel to avoid any use of alcohol or drugs that might impair their performance and has no legal requirements for licensees to develop and maintain fitness for duty programs. Accordingly, any enforcement action by way of orders or license modifications, suspensions and revocations could not be based on alcohol or drug use *per se* or the simple failure by a licensee to develop or maintain a fitness for duty program Instead, an additional showing would need to be made that the alcohol or drug use at issue or the failure to develop or maintain a fitness for duty program caused or has the potential for causing a safety problem. Civil penalties would not be available for alcohol or drug use without additional action by way of orders or license amendments or modifications establishing specific requirements in this area." [318]

On October 22, 1985, the Commission staff briefed the Commission on the fitness for duty issue.[319] At that meeting, Commissioner Asselstine expressed his fundamental disagreement with the proposed policy statement, on the ground that it was unenforceable. As a result of the meeting, on November 8, 1985, in a staff requirements memorandum, the Commission directed the staff to revise the policy statement to include the following broad objectives: "the expectation that each utility will include provisions for chemical testing in monitoring programs, and the expectation that each utility will develop a disciplinary program consistent with the EEI guideline." [320]

In an effort to expedite the Commission action on the fitness for duty policy statement, Commissioner Bernthal circulated a draft policy statement to his fellow Commissioners on October 31, 1985.[321] In the draft, Bernthal deleted the portion of the policy statement dealing with enforcement, on the ground that it was contrary to the spirit of voluntary cooperation between the industry and the NRC. He stated, "it serves no useful purpose to encourage, as the document does, the self-policing of the industry and at the same time to threaten possible enforcement action for which we have no arguable legal authority." [322]

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[318] Memorandum from William J. Dircks, Executive Director for Operations, Nuclear Regulatory Commission, to Commissioner Frederick M. Bernthal, Sept. 27, 1985.

[319] Discussion of Fitness for Duty, Oct. 22, 1985.

[320] Memorandum from Samuel J. Chilk, Secretary, Nuclear Regulatory Commission, to William J. Dircks, Executive Director for Operations, Nuclear Regulatory Commission, Nov. 8, 1985.

[321] Memorandum from Comissioner Frederick M. Bernthal to Chairman Palladino and Commissioners Roberts, Asselstine, and Zech, Oct. 31, 1985 (COMFB-85-16).

[322] *Id.*

On November 13, 1985, Commissioner Asselstine disapproved both the staff's proposed draft policy statement (SECY 85-21B) and the one proposed by Commissioner Bernthal (COMFB 85-16)—in both cases because, as policy statements, they would be unenforceable.[323] Rather, Asselstine favored promulgating a nonprescriptive rule which would prohibit anyone who is unfit for duty from being permitted access to vital areas of plants; and require licensees to have a program to ensure that no one who is unfit for duty gains access to vital areas. With such a rule, Asselstine argued, the Commission would have a clear basis for enforcement action in all cases in which a utility fails to maintain an effective fitness for duty program.

On December 2, 1985, Commissioner Zech expressed his views on the proposed fitness for duty policy statements.[324] He indicated that although he generally endorsed the NUMARC/staff negotiated fitness for duty policy statement presented in SECY-85-21B, he understood many of the concerns expressed by other Commissioners. He therefore stated that he could also concur with Commissioner Bernthal's draft policy statement.

By December 13, 1985, there were two votes in favor of the proposed policy statement (SECY 85-21B) and two votes against.[325] By December 31, 1985, following further discussions, Commissioners Bernthal, Roberts, and Zech had agreed to similar policy statements. Asselstine continued to oppose the policy statement. Chairman Palladino had not yet voted. The Commission continued to exchange memoranda through the month of January. During this time, Bernthal indicated his general concurrence with the draft presented by the staff. He did, however, believe that the Commission should delete a provision specifying that an acceptable fitness for duty program should include "the ability of licensees to demonstrate and assure fitness for duty of all power plant personnel by effective monitoring and testing procedures", on the ground that:

> It carries the Commission into highly prescriptive territory, and violates the spirit of the Commission's commitment to the industry. Some of the formal steps prescribed are of questionable legality, and they would be exceedingly difficult to enforce. I believe such detailed management decisions should be left to the discretion of the individual utilities, who are most familiar with the sociological milieu of their employees.[326]

On January 29, 1986, the Commission informed the staff that a majority, consisting of Commissioners Roberts, Bernthal, and Zech, had reached agreement on final language for a proposed policy statement.[327] The staff was directed to discuss the policy statement with INPO and NUMARC and advise the Commission of any comments or recommendations that the staff or industry might have by March 17, 1986. The Commission further indicated that it intended to complete action on the policy statement within 45 days.[328]

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[323] Memorandum from James K. Asselstine, Commissioner, to Samuel J. Chilk, Secretary, Nuclear Regulatory Commission, Nov. 13, 1985.

[324] Memorandum from Lando W. Zech, Jr., Commissioner, to Samuel J. Chilk, Secretary, Nuclear Regulatory Commission, Dec. 2, 1985.

[325] Commissioners Asselstine and Bernthal had voted against the proposed policy statement; Commissioners Roberts and Zech had voted in favor.

[326] Memorandum from Frederick M. Bernthal, Commissioner, to Samuel J Chilk, Secretary, Nuclear Regulatory Commission, Jan. 15, 1985.

[327] Memorandum from Samuel J. Chilk, Secretary, Nuclear Regulatory Commission, to Victor Stello, Jr., Acting Executive Director for Operations, Nuclear Regulatory Commission, Jan. 29, 1986.

The staff provided a copy of the Commission-approved policy statement to the industry representatives in early February. On March 5, 1986, the staff met with industry representatives for the purpose of coordinating fitness for duty approaches. On behalf of the NRC, James Taylor tentatively agreed to changes proposed by INPO in the wording of the policy statement. The industry gave Taylor a revised draft containing the industry's proposed changes for NRC staff and Commissioner discussion purposes. On April 9, 1986, Victor Stello Jr., James Taylor, and James Sniezek of the NRC staff met with NUMARC to discuss the policy statement in further detail, so that the industry and the Commission could reach a common understanding of the issues related to implementation of the revised proposed policy statement.[329]

On April 18, 1986, Ben B. Hayes, Director of NRC's Office of Investigations, expressed his opposition to the issuance of a policy statement in the area of fitness for duty, reiterating his earlier position that the issue of alcohol and drug abuse would be best resolved by the promulgation of explicit rules.[330]

By letter dated May 6, 1986, NUMARC informed the Commission that it "overwhelmingly endorsed the policy statement" which the NRC staff and NUMARC had discussed.[331] On July 7, 1986, the Commission approved the policy statement, as modified. At the same time, the Commission approved withdrawal of the earlier proposed rule.[332]

On July 30, 1986, Chairman Zech signed the Policy Statement, and on August 4, 1986, the NRC Policy Statement on Fitness for Duty of Nuclear Power Plant Personnel was published in the Federal Register.[333]

As part of this policy statement, the Commission indicated that it would defer promultation of a formal rule on fitness for duty, subject to the successful implementation of fitness for duty programs by the industry, and, at the end of the trial period, February 1, 1988, it would reassess the possible need for further NRC action based upon its view of the success or failure of industry programs at that time. Accordingly, the Commission directed the staff to provide periodic briefings during the next 18 months on the industry's experience with the policy.[334]

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[328] *Id.*

[329] The Commission was advised of the industry and NRC staff comments on the proposed Fitness for Duty Policy Statement in SECY-86-153, Fitness for Duty of Nuclear Power Plant Personnel, May 14, 1986.

[330] Memorandum from Ben B. Hayes, Director, Office of Investigations, Nuclear Regulatory Commission, to the Commission, April 18, 1986.

[331] Letter from J.H. Miller, Jr., Chairman, Steering Committee, NUMARC, to Victor Stello, Jr., Executive Director for Operations, Nuclear Regulatory Commission, May 6, 1986.

[332] Memorandum from Samuel J. Chilk, Secretary, Nuclear Regulatory Commission, to Victor Stello, Jr., Executive Director for Operations, Nuclear Regulatory Commission, July 7, 1986.

[333] 51 Federal Register 27921 (Aug. 4, 1986).

[334] *id.*

On December 1, 1987, the Commission held an open meeting in which it was briefed by NUMARC representatives and the NRC staff on the status of the industry's implementation of fitness for duty programs under the policy statement.[335] At that meeting, NUMARC representatives indicated that, based upon a utility survey conducted in 1986, all 54 utilities had fitness for duty programs which cover drug use on and off site. In addition, NUMARC noted that:

—All 54 utilities report that the use of alcohol on the job resultes in possible discharge;

—53 of the 54 utilities reported that the sale, use, or possession of illegal drugs on the job results in discharge from nuclear power plant activities (the 54th utility reported that the sale, use, or possession of illegal drugs results in withdrawal of unescorted access to vital areas and removal from safety-related activities);

—50 utilities reported that all managers and supervisors have received training in fitness for duty responsibilities, including recognition of aberrant behavior;

—52 of the utilities reported that appropriate training and guidelines have been provided to security personnel to address fitness for duty problems;

—53 utilities reported that all nuclear power plant employees receive initial fitness for duty training and information on the effects of drug and alcohol abuse;

—49 utilities reported that all contractor employees receive initial fitness for duty training and information on the effects of drug and alcohol abuse;

—All 54 utilities reported pre-employment chemical testing of employees;

—52 utilities currently use chemical testing for cause;

—All 54 utilities have established measures to ensure accuracy and quality of chemical testing procedures;

—22 utilities are using or are trying to use random chemical testing;

—32 utilities report that grievances or arbitrations have been or are being litigated regarding fitness for duty issues.

Upon questioning by Chairman Zech, the President of NUMARC stated that in the industry's view, no rule was necessary.[336]

The staff indicated at the December 1st briefing that there appeared to be top management support for fitness for duty programs in the industry; the EEI guidelines and the policy statement had, according to staff, been taken seriously and had received top management attention. The staff did, however, describe significant differences in cutoff levels for positive tests, in policies and practices relating to supervisor and peer referrals, in rehabilitation and/or dismissal, and in the use of random testing.

The staff, however, indicated that it had limited data on the effectiveness of industry fitness for duty programs. Based upon the information available, the staff noted that roughly two-thirds of the fitness for duty cases involved contractors and less than one-third involved regular plant employees. Since August of 1986, the staff noted that they were aware of only five cases where licensed operators were involved in some sort of fitness for duty matter, out of a total of 235 cases reported to date. Finally, the staff advised the Commission that industry policy and practice on random testing varied considerably.

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[335] Briefing on Status of Implementation of Fitness for Duty Program, December 1, 1987.

[336] *Id.*, p. 58.

In response to a question concerning the difficulty in implementing fitness for duty programs where state statutes proscribe certain aspects of these programs, the Commission's General Counsel, William C. Parler, advised the Commission that a policy statement alone would not supercede state restrictions on fitness for duty issues, including testing:

> If, indeed, those [state] laws are a serious problem from the standpoint of this agency's ability to accomplish its mission, clearly the answer is that we have to do something about it beyond a policy statement, or the Congress of the United States will have to do something about it. A policy statement will not solve the problem.[337]

In closing comments, Chairman Zech indicated that he thought the fitness for duty program should be considered a success. "I think there's been significant progress made." [338] Zech and Commissioner Bernthal indicated that they supported promulgation of a regulation to ensure a drug-free workplace and to address the lack of uniformity in industry programs.[339]

On December 16, 1987, the Commission, in a staff requirements memorandum, directed the staff to prepare a SECY paper containing a proposed fitness for duty rule:

> The paper should contain a range of options from random testing to less intrusive methods of testing which might be more acceptable to employees and employee unions. To the extent appropriate, the proposed rule should not displace the good features of the industry's efforts; it should address the 'tracking' of personnel who have been discharged for drug related reasons; it should address the need for, scope of, and necessary procedural safeguards for random testing programs and include in a proposed rule provisions for whatever random drug testing program the staff deems to be essential from the standpoint of protecting the public health and safety; and it should establish uniform requirements for testing and collection of data for proper evaluation and necessary corrective action to assure licensees' compliance with the fitness for duty regulation.[340]

On May 10, 1988, the staff submitted a proposed fitness duty rule to the Commission for consideration.[341] The Commission staff indicated that the staff's intent is to issue the proposed rule in June 1988 for a 120-day comment period and promulgate a final rule by June 1989.[342]

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[337] *Id.*, pp. 77-80.

[338] *Id.*, p. 91.

[339] *Id.*, p. 95.

[340] Memorandum from Samuel J. Chilk, Secretary, Nuclear Regulatory Commission, to Victor Stello, Jr., Executive Director for Operations, Nuclear Regulatory Commission, December 16, 1987.

[341] SECY-88-129, Proposed Rulemaking—Fitness for Duty Programs, May 10, 1988.

D. Maintenance Policy Statement

Nuclear powerplant maintenance, defined as the aggregate of those functions required to preserve or restore safety, reliability, and availability of plant structures, systems, and components, has been the subject of considerable interest recently. According to information compiled by the Commission, as of 1985, more than 35 percent of abnormal occurrences at nuclear power plants were attributable to maintenance factors, with the trend increasing as more plants became operational.[343] In addition, the NRC has identified both the lack of maintenance and improperly performed maintenance as principal contributors to a high frequency of degraded system performance.

Prior to 1985, the NRC addressed maintenance activities through a number of discrete NRC regulations, Regulatory Guides, and inspection procedures. Under Commission policy, the Commission has established fully enforceable maintenance requirements for those structures, systems, or components that are necessary to ensure the health and safety of the public—collectively referred to as "safety systems."[344] More specifically, these "safety systems" are defined as those systems that are relied upon to remain functional during and following design basis events to ensure:

1. the integrity of the reactor coolant pressure boundary, or
2. the capability to shutdown the reactor and maintain it in a safe shutdown condition, or
3. the capability to prevent or mitigate the consequences of accidents that could result in potential offsite exposures comparable to the 10 CFR Part 100 guidelines.

For the remaining parts of a nuclear power plant, referred to as "balance of plant", some enforceable requirements, in the form of regulations and license conditions exist for specific "balance of plant" systems that the staff has determined are also important to the safe operation of nuclear power plants, such as fire protection and security systems. There is no comprehensive policy governing maintenance of "balance of plant" systems.[345]

In 1985, in response to a request by the Commission for guidance on how best to identify technical and regulatory issues in nuclear power plant maintenance and surveillance, the NRC staff developed a Maintenance and Surveillance Program Plan (MSPP), for the purpose of surveying the status of maintenance in the industry and determining the adequacy of the existing Commission regulations on maintenance.[346] The first phase of the MSPP found that inadequate maintenance at some nuclear power plants was a significant contributor to plant and system reliability problems, and thus, was a safety concern. The MSPP also found that there was substantial variability in maintenance programs, practices, and effectiveness among utilities. "While measured plant performance has improved overall since 1980, the maintenance-related contribution to reportable events and challenges to safety systems remain high and is increasing by some measures."[347]

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[342] Memorandum from T.A. Rehm, AO/OEDO, to M. Callahan, GPA/CA, May 16, 1988.

[343] Status of Maintenance in the U.S. Nuclear Power Industry, 1985, NUREG-1212 (June 1986).

[344] Letter from Lando W. Zech, Jr., Chairman, Nuclear Regulatory Commission, to the Honorable John Breaux, Feb. 24, 1988, responding to questions from the Subcommittee, Question No. 40.

[345] *Id.*

[346] Status of Maintenance in the U.S. Nuclear Power Industry, *supra* note 343.

During the development of the MSPP, the Nuclear Utilities Management and Human Resources Committee (NUMARC) expressed a strong interest in this initiative. NRC management met with NUMARC representatives and NUMARC provided comments on drafts of the MSPP plan.

In addition, NUMARC identified a number of industry maintenance initiatives currently underway, including:

- —preliminary guidelines for the conduct of maintenance at nuclear power stations,
- —pilot Institute of Nuclear Power Operations (INPO) guidelines for maintenance self-assessments,
- —INPO-sponsored maintenance workshops,
- —expanded use of INPO's human performance evaluation system,
- —improved maintenance through accreditation, and
- —development of industry performance indicators.

On October 27, 1986, the NRC staff requested guidance from the Commission on the maintenance issue, recommending that the Commission direct the staff to prepare and submit a proposed policy statement on maintenance.[348] The staff emphasized that it has concluded that inadequate maintenance at some plants is a significant contributor to plant and system reliability problems and, thus, is of safety concern. The staff also found that there is substantial variability in maintenance programs, practices, and effectiveness between utilities.

At the same time, the staff noted that the industry maintenance initiatives have the potential to improve plant maintenance significiantly, if implemented on a consistent basis, and that the best way to improve maintenance would be to permit the industry to continue with these initiatives. The staff recommended development of a policy statement on maintenance to: (1) specify the Commission's long-term goals for nuclear plant maintenance; (2) specify the industry self-improvement initiatives which were being recognized; (3) articulate the respective NRC and industry roles in implementing industry's maintenance initiatives; and (4) specify the means of NRC oversight. The policy statement envisioned by the staff would indicate that to the extent that industry maintenance initiatives are effective, NRC would defer development of new maintenance requirements.

On April 27, 1987, the Commission approved the staff's proposal to develop a policy statement on maintenance.[349] Although Commissioner Roberts concurred, he indicated that he was not convinced that a policy statement was necessary because the staff had not concluded that maintenance was inadequate at most or all nuclear power plants. Commissioner Asselstine dissented, on the ground that a policy statement was much too weak a regulatory action for a major safety issue such as maintenance. Instead, he suggested that the Commission direct the staff to prepare a rule requiring licensees to develop and implement adequate maintenance programs.

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[347] *Id.*, p. iii.

[348] SECY-86-316, Maintenance Policy Statement, October 27, 1986.

[349] [cite].

On December 30, 1987, the staff submitted a proposed "Interim Policy Statement on Maintenance of Nuclear Power Plants" to the Commission.[350] The Commission was briefed on the policy statement on January 7, 1988 and, on February 25, 1988, the Commission approved a modified final policy statement, with the following additional directions:

> The Commission, with Chairman Zech and Commissioners Carr and Rogers concurring, directs the staff to develop a notice of proposed rulemaking for Commission review no later than August 1, 1988. The proposed rule should spell out NRC's expectations in maintenance within the framework of the . . . final policy statement, yet still encourage industry initiatives to achieve excellence. In preparing the proposed rule, the staff should consult in some open fashion with interested persons, including representatives of the regulated industry, and should consider maintenance approaches in other countries. Staff should also review practices in other industries in this country in which human performance and equipment reliability play an important role in safe operations, and regulatory activities which ensure the adequacy of these practices.[351]

The final Commission Policy Statement on Nuclear Power Plants was published in the Federal Register on March 23, 1988.[352] The Policy Statement provides that:

> Each commercial nuclear power plant should develop and implement a well-defined and effective program to assure that maintenance activities are conducted to preserve or restore the availability, performance, and reliability of plant structures, systems, and components. The program should clearly define the components and activities included, as well as the management systems used to control those activities. Further, the program should include feedback of specific results to ensure corrective actions, provisions for overall program evaluation, and the identification of possible component or system design problems. . . .
>
> The Commission expects to publish a Notice of Proposed Rulemaking in the near future that will establish basic re-

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[350] SECY-87-314, Interim Policy Statement on Maintenance of Nuclear Power Plants, Dec. 30, 1987.

[351] Memorandum from Samuel J. Chilk, Secretary, Nuclear Regulatory Commission, to Victor Stello, Jr., Executive Director for Operations and Raymond F. Fraley, Executive Director for the Advisory Committee on Reactor Safeguards, Feb. 25, 1988.

[352] 53 Federal Register 9430 (Mar. 23, 1988).

> quirements for plant maintenance programs. We believe that the contents and bounds of the proposed rule will fall within the general framework described in this Policy Statement.[353]

On May 16, 1988, the Commission staff indicated that the maintenance rulemaking is in the formative stage with the staff considering input from national standards groups, the nuclear industry, and other industries. The staff's current plans call for submission of a proposed rule to the Commission in December 1988, with a final rule possible by December 1989.[354]

E. SUBCOMMITTEE CONCLUSIONS

Based upon the evidence examined by the Subcommittee, the Subcommittee has reached the following conclusions with respect to policy statements:

(1) The Commission has relied increasingly upon policy statements as a means to obtain conformance by NRC licensees with regulatory objectives and standards, rather than for the purpose of merely announcing policy that the Commission intends to implement in future rulemaking or adjudications. In this regard, policy statements have been employed by the Commission both to establish guidance for licensee-specific programs that are necessary to obtain compliance with general NRC standards, as in the area of the training and qualification of nuclear power plant operations and to establish guidance for the development of industry-wide standards, as in the area of fitness for duty.

(2) Where the Commission is confronted with a high degree of plant-specific considerations, or where there is great expertise on a particular issue within the regulated community, the Subcommittee is of the view that policy statements can prove to be an effective means of addressing issues of regulatory concern, so long as the approach taken by the Commission provides a sufficient basis for taking necessary enforcement action.

(3) In view of the fact that policy statements do not establish enforceable requirements, the Subcommittee is of the view that the Commission should devote careful consideration when relying on a policy statement to the enforcement issue, to ensure that the Commission has the ability to enforce compliance with standards that the Commission believes should be met by licensees. When the Commission deems it appropriate to address a given issue of regulatory concern through a policy statement, the Subcommittee is of the view that it is essential that the Commission have a basis for taking enforcement action in that specific area, rather than simply relying on the general authority available to the Commission under the Atomic Energy Act to protect the public health and safety as the basis for enforcement action. Enforceable regulations are the most effec-

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[353] *Id.*

[354] Memorandum for T.A. Rehm, AO/OEDO, to M. Callahan, GPA/CA May 16, 1988.

tive way to ensure compliance with requirements that the Commission believes should be imposed upon its licensees.

(4) The use of a policy statement to establish guidance for operator training and qualification programs has proven successful to date. The Commission's policy statement, and the industry's initiatives, have resulted in improved programs for the training and qualification for nuclear power plant personnel. In the Subcommittee's view, this is attributable, in part, to the fact that the Commission has established enforceable regulatory requirements that nuclear power plant operators be properly trained and qualified.

(5) In the case of the Commission's Fitness for Duty initiative, there is no similar regulatory requirement underlying the proposed Policy Statement that specifically requires that individuals in safety-sensitive positions avoid the use of alcohol or drugs that might impair their performance. As a consequence, the basis for any enforcement action that the Commission might wish to take is less clear cut. In view of this, the Subcommittee approves of the Commission's intention to promulgate a regulation governing Fitness for Duty issues and the legislation reported by the Committee would so require.

(6) In the area of nuclear power plant maintenance, the Subcommittee notes that the Commission intends to promulgate a regulation that, in turn, would serve as the basis for taking specific enforcement action in response to maintenance concerns.

(7) Generally, in the three major areas examined by the Subcommittee, the opportunity for the public to participate in the development of policy statements and the specific programs established pursuant to these policy statements has been more limited than what would have been available had regulations been established, following an opportunity for notice and comment by the public. Accordingly, the Subcommittee is of the view that the Commission should endeavor to ensure that its deliberations with representatives of industry organizations on the development of policy statements and the specific programs established pursuant to these policy statements are a matter of public record and that interested members of the public have an opportunity to participate in such deliberations.

(8) Where, consistent with the above findings, a policy statement permits a more timely response by the Commission to a given issue of regulatory concern, such timely action can be an advantage of the policy statement approach. The Subcommittee notes, however, that in the case of the Commission's fitness for duty initiative, the Commission has devoted considerable time to the development of a policy statement addressing this issue, from the time that fitness for duty issues were first identified in 1982 as a concern.

F. SUBJECTS ADDRESSED IN COMMISSION POLICY STATEMENTS

The following list identifies the policy statements, by subject matter, that have been proposed or adopted by the Commission:

Administration

Camera coverage of hearings before Atomic Safety and Licensing Boards and Licensing Appeal Boards (43 FR 4294; February 1, 1978)

Agency policy and procedures for differing professional opinions; proposed (44 FR 59686; Oct. 16, 1979)

Regionalization (49 FR 7676; Mar. 1, 1984)

Coordination and information exchange meetings between NRC staff and organizations involved in the study of he nuclear power industry (50 FR 41480; Oct. 11, 1985)

Agreement States

Criteria for guidance of States and NRC in discontinuance of NRC regulatory authority and assumption thereof by States through agreement (46 FR 7540; Jan. 23, 1981 as amended by policy statements published at 46 FR 36969; July 16, 1981 and 48 FR 33376; July 21, 1983)

Evaluation of Agreement State radiation control programs (52 FR 21132; June 4, 1987)

Conduct of Proceedings

Domestic license application; open meetings (43 FR 28058; June 28, 1978)

Conduct of licensing proceedings (46 FR 28533; May 27, 1981)

Issuance of uncontested fuel loading and low power testing operating licenses (46 FR 47906: Sept. 30, 1981)

Investigations, inspections, and adjudicatory proceedings (49 FR 36032; Sept. 13, 1984)

Handling of late allegations (50 FR 11030; Mar. 19, 1985)

Confidentiality (50 FR 48506; Nov. 25, 1985 as corrected by policy statement published at 50 FR 50864; Dec. 12, 1985)

Consumer Products

Products intended for use by general public (consumer products) (30 FR 3462; Mar. 16, 1965)

Environment

Programmatic environmental statement of the cleanup of Three Mile Island Unit 2 (46 FR 24764; May 1, 1981)

Licensing and regulatory policy and procedures for environmental protection; uranium fuel cycle impacts (47 FR 50591; Nov. 8, 1982)

Medical Uses

Regulation of the medical uses of radioisotopes (44 FR 8242; Feb. 9, 1979)

Nuclear Fuel

Mixed oxide fuel (42 FR 65334; Dec. 30, 1977)

Use of high-enriched uranium in research reactors (47 FR 37007; August 24, 1982)

Power Plants

Program for resolution of generic issues related to nuclear power plants (43 FR 1565; Jan. 10, 1978)

Standardization of nuclear power plants (52 FR 34884; Sept. 15, 1987)

Recommendations for improved nuclear power plant licensing (43 FR 49082; Oct. 20, 1978)

Generic rulemaking to improve nuclear power plant licensing, interim (43 FR 58377; Dec. 14, 1978)

Planning basis for emergency responses to nuclear power reactor accidents (44 FR 61123; Oct. 23, 1979)

Planning basis for emergency responses to nuclear power reactor accidents, EPA policy statement (45 FR 2893; Jan. 15, 1980)

Nuclear power plant accident considerations under the National Environmental Policy Act of 1969 (45 FR 40101; June 13, 1980)

Further Commission guidance for power reactor operating licenses (45 FR 85236; Dec. 2, 1980 as corrected by PS published at 46 FR 15242; Mar. 4, 1981)

Nuclear power plant staff working hours (47 FR 23836; June 1, 1982)

Environmental qualification of electric equipment (49 FR 8422; Mar. 7, 1984)

Systematic safety evaluation of operating nuclear power reactors (49 FR 45112; Nov. 15, 1984)

Environmental qualification of electrical equipment; Status of June 30, 1982 deadline (49 FR 45114; Nov. 15, 1984)

Training and qualification of nuclear power plant personnel (50 FR 11147; Mar. 20, 1985)

Emergency planning (50 FR 20892; May 21, 1985)

Severe reactor accidents regarding future designs and existing plants (50 FR 32138; Aug. 8, 1985)

Engineering expertise on shift (50 FR 43621; Oct. 28, 1985)

Regulation of Advanced Nuclear Power Plant; Statement of Policy (51 FR 24643; July 8, 1986)

Fitness for Duty of Nuclear Power Plant Personnel (51 FR 27921; Aug. 4, 1986)

Safety Goals for the Operation of Nuclear Power Plants (51 FR 28044; Aug. 4, 1986 as corrected and republished on 51 FR 30028; Aug. 21, 1986)

Emergency Planning—Medical Services (51 FR 32904; Sept. 17, 1986)

Production and Utilization Facilities; request for comments on development of policy for nuclear power plant license renewal (51 FR 40334; Nov. 8, 1986)

Request for Comments on Development of Policy for Nuclear Power Plant License Renewal (51 FR 47249; Dec. 31, 1986)

Request for Comments on Development of Policy for Nuclear Power Plant License Renewal (51 FR 47249; Dec. 31, 1986)

Proposed Policy Statement on Technical Specification Improvements for Nuclear Power Reactors (52 FR 3788; Feb. 6, 1987)

Commission Policy Statement on Deferred Plants (52 FR 38077; Oct. 14, 1987)

Integrated Schedules for Implementation of Plant Modifications; Proposed Policy Statement (52 FR 45344; Nov. 27, 1987)

Proposed Policy Statement on Nuclear Power Plant Access Authorization Program (53 FR 7534; Mar. 9, 1988)

Maintenance of Nuclear Power Plants (53 FR 9430; Mar. 23, 1988)

Radioactive Waste

Low-level waste volume reduction (46 FR 51100; Oct. 16, 1981)

Reports and Reporting

Abnormal occurrence reports (42 FR 10950; Feb. 25, 1977)

Information flow (47 FR 31482; July 20, 1982)

Transportation

NRC response to accidents occurring during the transportation of radioactive material (49 FR 12335; Mar. 29, 1984)

APPENDIX 4. AGENCY ENFORCEMENT

Reopening of Enforcement Cases

In February 1986, the staff recommended that the Commission adopt a policy with respect to the reopening of closed enforcement cases.[355] In SECY 86-74, dated February 7, 1986, the staff stated:

> The staff believes that if additional information indicates that a previously closed enforcement action was inappropriate, the original action should be withdrawn and the appropriate action taken unless the deterrent benefits associated with such action would be outweighed by the prejudice to the recipient.[356]

Later, in August of 1986, the staff concluded that cases involving the reopening of a closed enforcement case occur relatively infrequently. Accordingly, it took the view that the reopening issue should not be included as part of the NRC's Enforcement Policy.[357] Instead, the staff in SECY 86-234 requested that the Commission approve the following guidance:

> If significant new information is received by the NRC which indicates that an enforcement sanction was incorrectly applied, that action could be reopened to correct the record. For example, if new information shows that a violation was less serious than originally believed, the record could be changed to reflect a lesser sanction. If, on the other hand, significant new information indicates that the sanction was not severe enough to provide adequate deterrent effect, the record could be reopened to increase the sanction. However, if the licensee would be severely or unjustly prejudiced by a change in the enforcement sanction, then the need to correct the record and deter future misconduct would be balanced against this negative effect. Reopening an enforcement action is expected to occur only rarely and would require specific prior approval of the Director, IE.[358]

On September 17, 1986, the Commission disapproved the staff's suggestion to approve reopening to impose greater sanctions in cases in which significant new information indicates that the original sanction was insufficient.[359] The Commission did agree, however, that reopening is appropriate if new information demonstrates a need to require additional remedial action to abate the effects of the prior violation. At the time, Commissioner Frederick M. Bernthal expressed the view that reopening should be handled on a case-by-case basis.[360] The Commission then adopted the following guidance to be included as part of its enforcement policy:

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[355] SECY-86-74, Annual Report on the Enforcement Program and Response to the "Report of the Advisory Committee for Review of the Enforcement Policy," February 7, 1986.

[356] *Id.*

[357] SECY-86-234, Proposed Changes to Enforcement Policy & Enforcement Guidance Related to SECY-86-74, Aug. 7, 1986.

[358] *Id.*

[359] *See* SECY-88-33, Reconsideration of Enforcement Policy Provision Involving Reopening Closed Cases, Jan. 29, 1988.

> If significant new information is received by the NRC which indicates that an enforcement sanction was incorrectly applied, that action could be reopened to correct the record. Reopening should occur only (1) if remedial action, e.g., in the form of an order, is necessary to abate the continued harm of a violation to the public health and safety, the common defense and security, or the environment or (2) if new information shows that a violation was less serious than originally believed or that it did not occur. Enforcement action would not be reopened where the only change to the prior action would be to increase the severity level of a violation or to impose or increase a civil penalty. Reopening an enforcement action is expected to occur only rarely and would require specific approval of the Director, IE.[361]

On September 10, 1987, the Commission directed the staff to revise the third sentence quoted above by inserting the word "normally" so that it would read "Enforcement actions would normally not be reopened where the only change to the prior action would be to increase the severity level of a violation . . ."[362]

The policy was published, as revised, on September 28, 1987.[363] The Commission received two comments concerning the reopening issue in response to its notice in the Federal Register. One urged that the Commission's policy should provide that the NRC hold a conference with the licensee before reopening a closed case. The other comment from a representative of a number of power reactor licensees supported the provision as published, emphasizing the importance of "finality to enforcement actions."

At a hearing before the Subcommittee on October 20, 1987, Chairman John Breaux asked the Commission to explain the reason why it had adopted the above-quoted policy of reopening a safety violation case based on new information if the sanction against a licensee would be reduced, but not if the sanction would be increased.[364]

The NRC Chairman, Lando W. Zech, Jr., indicated in response that he did not interpret the policy's language the same way the Subcommittee Chairman did. Zech indicated that in his view, the word "normally" was inserted (as discussed above) with the intent of putting judgment into the reopening decision and that if new evidence showed that a matter was more severe than the NRC had previously determined, it could increase the severity level and impose a more severe sanction. However, in view of the confusion over the proper interpretation of the language, Zech agreed to reexamine the wording and advise the Subcommittee what the Commission decided to do as a result of its review.[365]

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[360] *Id.*, p. 2.

[361] *Id.*

[362] *Id.*

[363] *Id.*

[364] Hearing of the Subcommittee on Nuclear Regulation on the Nuclear Regulatory Commission's Regulatory Interface with Industry, Oct. 20, 1987.

On January 29, 1988, the staff sought Commission of a modification of the Enforcement Policy in regard to reopening of closed enforcement cases.[366] The revision provides:

> If significant new information is received or obtained by NRC which indicates that an enforcement sanction was incorrectly applied, consideration may be given, dependent on the circumstances, to reopening a closed enforcement action to increase or decrease the severity of a sanction or to correct the record. Reopening decisions will be made on a case-by-case basis, are expected to occur rarely, and require the specific approval of the Deputy Executive Director for Regional Operations.[367]

By letter dated February 24, 1988, Zech informed the Subcommittee that the Commission had completed action on the revision, in a manner "which clarifies that the NRC would consider the merits of reopening a closed case for the purposes of both increasing and decreasing the enforcement sanction." The Chairman's letter concluded by stating that the staff would be preparing a notice for publication in the Federal Register with the clarifications to the enforcement policy.[368]

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[365] *Id.*

[366] SECY-88-33, *supra* note 359.

[367] *Id.*

[368] Letter from Lando W. Zech, Jr., Chairman, Nuclear Regulatory Commission, to the Honorable John Breaux, Feb. 24, 1988.

APPENDIX 5. CONTROL OF NUCLEAR REGULATORY COMMISSION DOCUMENTS

The Commission's policy with respect to the control of documents, including the release of pre-decisional information, the release of investigative information, and the review by NRC staff of licensee documents, is set forth in a series of memoranda covering these various areas.

On October 7, 1983, the Commission's Executive Director for Operations issued a policy statement setting forth guidance for Agency employees on the distribution of draft inspection and investigation reports.[369] The relevant portions of that guidance are summarized below:

Release of Draft Inspection Reports

> Under no circumstances should draft inspection reports, either in their entirety or excerpts from them, be relased to licensees or their agents, or to any source external to the NRC without the express permission of the EDO. . . .
>
> In the event any draft inspection report is inadvertently or otherwise released contrary to this policy, the EDO should be promptly advised in writing. The EDO will take or recommend action as appropriate.

Release of Draft Investigation Reports

> The Regional Administrator shall inform the Director, OI, in advance that information related to an open investigation is being considered for release to the licensee because safety or security concerns require initiation of corrective actions before publication of the investigation report. The Director, OI, should review the information to be released and advise the Regional Administrator of the anticipated effect of its release on the course of the investigation. The Regional Administrator will release the information only after the determining that the safety or security concerns are significant enough to justify the risk of compromising the effectiveness of the investigation and, possibly, subsequent enforcement or prosecution actions. Any such release of information should be recorded in the investigation report.
>
> Pursuant to Commission approved OI policy, draft OI reports of investigation will not be circulated out-

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[369] Memorandum from William J. Dircks, Executive Director for Operations, Nuclear Regulatory Commission, to Richard C. DeYoung, Director, Inspection and Enforcement, Nuclear Regulatory Commission, and all Regional Administrators, October 7, 1983.

> side the NRC without the specific approval of the Chairman. (OIA draft reports of investigation will under no circumstances be reviewed with or given to licensees, their agents, or to any source external to NRC, without the express permission of the Director, OIA). Requests for such permission should be made through the EDO.[370]

On December 3, 1984, the Executive Director for Operations issued a second policy statement, noting that since the first guidance was published"

> [O]ther events have occurred that indicate the need for a general policy statement that addresses the release of all NRC reports and other documents, either in their draft or final form. . . . The major premise of the . . . policy statement is that documents will not be provided to one licensee or member of the public unless they can be made available (generally through the Public Document Room) to all.[371]

The December 3rd policy statement provides, in pertinent part, the following guidance:

> Draft documents, or information contained therein, are not to be discussed with, given to, or shown to any licensee or the public by NRC staff without prior approval.
>
> Predecisional interagency or intraagency memoranda and letters shall not be provided to licensees or the public or placed in the PDR without prior management approval.
>
> In the event any document is inadvertently or otherwise released by the NRC, its contractors or other Government agencies contrary to this policy, the EDO should be advised in writing of the occurrence and the corrective action to be taken by the responsible Office to avoid recurrence of such release. Normally, under such circumstances, the released document should be placed in the PDR.[372]

The policy statement identifies the specific exceptions to this general policy:

> In the event there is an emergency, or a significant safety or safeguards issue appears to require immediate action, NRC personnel, at their discretion, may discuss with, show to, or provide the licensee with any pertinent material they believe the circumstances warrant.
>
> In the normal course of conducting regulatory activities, communications with licensees, vendors, industry representatives and other Government agencies are at times necessary regarding initial NRC staff positions, license conditions, confirmation of action letters, inspection findings, preparation of bulletins and information notices,

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[370] *Id.*

[371] Memorandum from William J. Dircks, Executive Director for Operations, Nuclear Regulatory Commission, to Office Directors and Regional Administrators, Nuclear Regulatory Commission, December 3, 1984.

[372] *Id.*

> events at other facilities, etc. . . . Any written communications provided by the staff to licensees or the public shall, however, be placed in the PDR.
>
> Draft research reports, studies, data or other documentation based on information obtained from licensee or vendor, which may be discussed or exchanged with those parties and other participants in a study or research program, are not subject to restraint under this policy.
>
> Draft proposed and final rules, policy statements and other documents pertaining to materials regulated by the Agreement States may be sent to the Agreement States for comment and are not subject to restraint under this policy.[373]

On March 2, 1987, the Executive Director for Operations issued a memorandum establishing guidance governing the timing of the disclosure to licensees of pending investigations and/or criminal referrals.[374] This memorandum, which deals only with the disclosure of a pending investigation or criminal referral, covers three general areas:

> *I. Communications with licensees during the inspection/investigation process*
>
> Nuclear safety and security concerns must be addressed by prompt, positive actions. Accordingly, except as described below, safety or security information must be promptly and clearly identified to responsible licensee management to obtain timely licensee evaluation and, if appropriate, safety-related corrective actions. . . . Generally, there should be no need to disclose the fact that an investigation is either contemplated or under way when providing information to a licensee pertaining to safety concerns or to obtain correction of a specific technical issue. However,
>
> > A. When information cannot be released without risk of compromising an investigation, the Regional Administrator shall inform the Director, OI, in advance that information related to an open investigation is being considered for release to the licensee because safety or security concerns require initiation of immediate corrective actions before publication of the investigation report. The Director, OI, will review the information to be released and advise the Regional Administrator of the anticipated effect of its release on the course of the investigation. . . .
> >
> > B. Generally there should be no need to link the fact that an investigation is under way when providing information to licensees pertaining to potential safety concerns or to obtain correction of a specific technical issue. However, when for the

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[373] *Id.*

[374] Memorandum from Victor Stello, Jr., Executive Director for Operations, to Office Directors and Regional Administrators, Nuclear Regulatory Commission, March 2, 1987.

> reasons stated above, the Regional Administrator decides after consultation with OI to delay informing a licensee of an issue, this decision and the basis on which the delay is found to be consistent with public health and safety should be documented by the appropriate Regional Administrator and the decision reexamined every three months to assure its continuing validity.
>
> *II. Department of Justice*
>
> As a general rule, the fact that a particular matter has been or will be referred to the Department of Justice (DOJ) should never be disclosed to the licensee. A reply of "I cannot comment on that matter" is appropriate in most cases. However, if a Regional Administrator or Office Director feels he or she must disclose that a referral has been or will be made to the Department of Justice, such disclosure will be made only with the prior concurrence of the Director, OI.
>
> *III. Enforcement Actions*
>
> "Enforcement actions which could reveal the existence of a pending investigation should be coordinated with the Director, OI. The Director, OI, should be provided with the reasons why the enforcement action should proceed during the pending investigation.[375]

On September 9, 1987, the Executive Director established guidance for NRC review of licensee documents.[376] As a general matter, this document establishes the policy that:

> As a regulatory agency, the NRC staff has the obligation of overseeing licensee activities for compliance with conditions of a license and with the regulations and orders of the Commission. A review or discussion of a draft document by the NRC would be inappropriate if the review would have the real or perceived appearance of impropriety (such as where the staff member steps out of the role of regulator and into the role of advisor) or of giving more of an advantage to one licensee than to another. The decision whether it is proper for the NRC to review a draft of a particular licensee document should be based solely on the need for the NRC to review the draft in carrying out its regulatory obligations. Any document obtained from a licensee which the licensee indicates is a draft, should be clearly marked as such.[377]

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[375] *Id.*

[376] Memorandum from Victor Stello, Jr., Executive Director for Operations, Nuclear Regulatory Commission, to Office Directors and Regional Administrators, Nuclear Regulatory Commission, September 9, 1987.

[377] *Id.*

The document identifies the situations in which, "consistent with this policy, NRC review of drafts of the following licensee, applicant, or vendor-related documents, would be improper:

> Licensee documents arguing that violations did not occur.
>
> Licensee documents arguing the appropriateness of sanctions imposed on it; e.g., civil penalties.
>
> Licensee documents arguing whether or not an order should be imposed.
>
> Responses to 50.54(f) letters and similar requests for information specifically requested under oath or affirmation (excluding appropriate technical licensing documents).
>
> In other cases, an examination of draft documents from a licensee, applicant, or vendor which the NRC desires and which is in the interest of the NRC in carrying out public health and safety responsibilities as contrasted to purely assisting the licensee, may be proper. Included in this category are draft documents that:
>
> Could assist an inspection or an assessment of corrective actions.
>
> Could form the basis for a confirmatory order.
>
> Could form the basis for a settlement agreement.[378]

Finally the September 9th guidance indicates that:

> It is also the Commission's policy to address all matters of safety in public. Consequently, it is the Commission's policy generally that any document, including those labeled "drafts," considered by the staff in reaching a regulatory decision should be placed in the appropriate docket file and the Public Document Room (PDR) unless the document falls within [certain exempted categories.] [379]

Finally, on October 6, 1987, in response to a request from Chairman Zech, the Executive Director for Operations collated and reviewed the guidance available to NRC employees on their relationships with the nuclear industry.[380] This memorandum summarized the following guidance:

(1) Release of Information to Licensees

(a) Control of NRC Reports and Documents

> Guidance to the staff on release of information to licensees is provided in a December 3, 1984 EDO Memorandum, "Policy on Control of NRC Reports and other Documents." The policy statement on control of NRC reports and other documents addresses the release of all NRC reports

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[378] *Id.*

[379] *Id.*

[380] Memorandum from Victor Stello, Jr., Executive Director for Operations, Nuclear Regulatory Commission, to Chairman Zech, and Commissioners Roberts, Bernthal, Carr, and Rogers, Oct. 6, 1987.

> and other documents, either in their draft or final form. The major premise of the policy statement is that draft and predecisional information will not be provided to one licensee or member of the public unless they can be made available (generally through the Public Document Room) to all . . .
>
> (b) Disclosure of Pending Investigations
>
> Guidance to the staff on the disclosure of pending investigations is provided in a March 2, 1987 EDO Memorandum, "The Timing of the Disclosure to Licensees of Pending Investigations and/or Criminal Referrals." The memorandum deals only with the disclosure of a pending investigation or criminal referral. The major premise of this memorandum is that such information should be disseminated to licensees to transmit safety-related information promptly to obtain appropriate evaluation and timely corrective actions while at the same time avoiding the disclosure of information which could reveal the identity of confidential sources or compromise an actual or potential investigation or criminal referral. . . .
>
> (c) NRC Review of Licensee Documents
>
> Staff guidance for review of licensee documents is provided in a September 9, 1987 Memorandum, "Guidance for NRC Review of Licensee Documents". The essence of this document is that a review or discussion of a draft document by the NRC would be inappropriate if the review would have the real or perceived appearance of impropriety (such as where the staff member steps out of the role of regulator and into the role of advisor) or of giving more of an advantage to one licensee than to another. . . .[381]

On February 9, 1988, the Commission's policies and guidance documents on the release of draft and predecisional documents and information were codified as part of the Commission's manual.[382]

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[381] *Id.*

[382] NRC Manual, Bulletin No. 3203-18, Feb. 9, 1988.

APPENDIX 6. AGENCY PROCEDURES FOR MEETINGS BETWEEN NRC STAFF AND PERSONS OUTSIDE THE AGENCY

In carrying out the Commission's statutory responsibilities, the Commission staff meets regularly with persons outside of the agency, including representatives of licensees, environmental groups, state and local governments, and other persons with an interest in the Commission's regulatory activities. Some of these meetings are governed by the Commission's formal procedures in 10 CFR Part 2, while others are not.

As a general matter, the Commission's policy governing meetings that occur during the licensing process is set forth in a statement issued by the Executive Director for Operations to the staff.[383] Under this policy statements, parties, potential parties and the general public are permitted to attend meetings between an applicant for a license and the NRC staff. Under a second policy statement,[384] this policy was reiterated. In addition, this second policy statement clarified that the open meeting policy is applicable to the time period both prior to, and after, the docketing of a license application.

Agency guidance for staff meetings with the Institute of Nuclear Power Operations (INPO) is set forth in a Memorandum of Agreement between the NRC and INPO.[385] The Agreement provides for periodic meetings between the two parties of the exchange of technical information and for the minutes of such meetings to be placed in the Commission's Public Document Room, but is silent with regard to meetings other than for the exchange of information.

On January 28, 1988, Victor Stello, Executive Director for Operations, forwarded to Chairman Zech a number of proposed changes in this Agreement, reflecting discussions with INPO.[386] In the Memorandum, Stello requested authorization from the Commission to enter into the modified Agreement. Accordingly, the Memorandum was forwarded to all of the Commissioners, requesting comments by February 17, 1988.[387] To date, no approval has been received from the Commission and the original Agreement remains in effect.

Agency guidance for staff meetings with the Nuclear Management and Resources Council (NUMARC) is set forth in a Memorandum of August 10, 1987.[388] Generally, the Memorandum reflects the view of the NRC staff that the Commission should conduct its affairs with NUMARC in the open, but establishes no specific procedures for achieving that objective.

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[383] 43 Federal Register 28058 (June 28, 1978).

[384] 43 Federal Register 49082 (Oct. 20, 1978).

[385] Memorandum of Agreement between the Institute of Nuclear Power Operations and the U.S. Nuclear Regulatory Commission (with appendices), Dec. 18, 1985.

[386] Memorandum from Victor Stello, Jr., Executive Director for Operations, Nuclear Regulatory Commission, to Lando W. Zech, Jr., Chairman, Nuclear Regulatory Commission, Jan. 28, 1988. The modifications contained in this Memorandum do not involve the issue of public access to NRC-INPO meetings or the availability of minutes of such meetings.

[387] Memorandum from Samuel J. Chilk, Secretary, Nuclear Regulatory Commission, to the Commission, Feb. 1, 1988.

On September 15, 1987, Chairman Zech requested that the NRC staff provide the Commission with a review of the current guidance available to NRC employees on their relationships with applicants, licensees, industry groups, and public interest groups.[389] In response to that request, the staff provided the Commission with a summary of the guidance covering these activities, and further indicated that, in the staff's view, the existing guidance "is adequate in substance but not in form." [390] Accordingly, the staff advised the Commission that the staff intended to set forth this guidance in a single document, and submit it for Commission review and approval.[391]

On November 27, 1987, the staff recommended that the Commission approve a policy statement establishing the criteria and procedures for determining which meetings between the NRC staff and outside persons should be open to the public.[392] The proposed policy statement would have established three criteria for determining whether a meeting between NRC staff and outside persons will be open to the public:

> (1) the meeting involves the discussion of the substantive issues related to the development or implementation of an NRC regulatory decision;
>
> (2) public observation would not result in premature disclosure of information or dissemination of unverified or inaccurate information; and
>
> (3) public observation would not substantially interfere with the carrying out of NRC responsibilities.[393]

Under the proposed policy statement, any meeting that satisfied the criteria would be open to public observation, subject to the exceptions discussed in the policy statement (*e.g.*, meetings involving the discussion of proprietary information, classified information, or information on enforcement actions or investigations in progress). Finally, the proposed policy statement would only apply to meetings between the NRC staff and outside persons. It would not apply to meetings involving the Commission or individual Commissioners (procedures for these meetings are set forth in 10 CFR Part 9).

On January 26, 1988, the Commission disapproved SECY-87-293, by a 4-to-1 vote (Rogers dissenting). The Commission advised the staff that the Commission:

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[388] Memorandum from Victor Stello, Jr., Executive Director for Operations, Nuclear Regulatory Commission, to the File, Aug. 27, 1987.

[389] Memorandum from Lando W. Zech, Jr., Chairman, Nuclear Regulatory Commission, to Victor Stello, Jr., Executive Director for Operations, Nuclear Regulatory Commission, Sept. 15, 1987.

[390] Memorandum from Victor Stello, Jr., Executive Director for Operations, Nuclear Regulatory Commission, to the Commission, Oct. 6, 1987.

[391] *Id.*

[392] SECY-87-293, Policy Statement on Meetings Between NRC Staff and Outside Persons (Nov. 27, 1987).

[393] *Id.*

> [F]ully supports the Commission and staff operating in as open a manner as possible. However, [we] could discern no problem which would justify the Commission adopting the proposed formal policy in lieu of existing guidance on open meetings.[394]

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[394] Memorandum from Samuel J. Chilk, Secretary, Nuclear Regulatory Commission, to Victor Stello, Jr., Executive Director for Operations, Nuclear Regulatory Commission, Jan. 26, 1988.

APPENDIX 7. INDUSTRY ORGANIZATIONS

A. Institute of Nuclear Power Operations

After the accident at Three Mile Island in 1979, the nuclear electric utility industry established the Institute of Nuclear Power Operations (INPO) to promote improved safety and reliability in the operation of its nuclear power plants. According to INPO, its role is in promoting excellence in managing and operating its members' nuclear power plants and attaining the best possible performance from nuclear utilities. Each member utility of INPO is responsible for safely operating its plants. INPO was not created to supplant any of the responsibility of its member utilities or the regulatory role of the NRC; rather it was established to provide a means whereby the nuclear utility industry could make its operations safer.

INPO's structure is based on the corporate model. A board of directors oversees INPO's operations and activities. The Board consists of utility executives or senior managers elected by INPO's member utilities. The President of INPO is elected by and reports to the board. INPO's technical and support divisions report to the president.

All utilities in the U.S. which have nuclear power plants are members of INPO. Nuclear steam system suppliers, architect-engineering firms, and construction companies also participate in INPO. Also, non-nuclear utility organizations participate in INPO.

The following summary provides an overview of some of INPO's major activities.

—*Evaluation programs.*—INPO conducts periodic examinations of operating nuclear power plants, plants under construction, and corporate support of construction projects and operating plants. These evaluations are based on INPO-supported performance criteria.

—*Accreditation of training programs.*—INPO manages the accreditation of utility training programs conducted for operations, maintenance, and technical personnel. Member utilities seek accreditation in ten separate training programs to become members of INPO's National Academy for Nuclear Training.

—*Events analysis program.*—INPO analyzes abnormal events that occur in construction, testing, and operation of plants. INPO disseminates to its members the "lessons learned" from these events, to identify potentially more serious events, and to resolve identified problems.

B. NUCLEAR MANAGEMENT AND RESOURCES COUNCIL

In 1984, a group of industry leaders formed, under an informal charter, the Nuclear Management and Human Resources Committee (NUMARC) to provide a unified nuclear utility position on selected management and human resource issues. In the spring of 1987, NUMARC became a formal, incorporated association to serve as the industry's principal voice for conveying industry views, concerns, and policies regarding industry-wide regulatory issues to the NRC and other government agencies. At that time, the organization was renamed the Nuclear Management and Resources Council. A principal objective of NUMARC is to enhance the resolution of problems between the NRC and the nuclear power industry by providing a unified avenue of communication between the NRC and the industry.

NUMARC is governed by a Board of Directors and an Executive Committee. The Board of Directors, consisting of one representative from each member utility, adopts formal nuclear utility industry positions on regulatory issues. The Executive Committee, consisting of senior nuclear operating executives, creates special committees it deems necessary to accomplish NUMARC's mission.

NUMARC has two categories of membership: members and participants. Members are comprised of the 55 utilities holding operating licenses or construction permits for nuclear power plants from the NRC. Participants are vendors of nuclear steam supply systems, architect-engineering firms, and owners of interests in nuclear power plants other than licensees.

APPENDIX 8. AGENCY PROCEDURES—MEETINGS AND DECISIONMAKING

The following description of the Commission's decisionmaking process, as set forth in a document entitled "Internal Commission Procedures", prepared by the Commission's Office of the Secretariat (SECY), explains the various procedures used by the Commission for arriving at decisions, as well as the procedures for release of documents in response to Freedom of Information Act requests.

The primary decision-making tool of the collegial Commission is the written issue paper submitted by the Office of the Executive Director for Operations (EDO) or other offices reporting directly to the Commission. These papers are known as SECY papers.

An additional vehicle for Commission decision-making is the written exchange of memoranda among (or between) Commissioners. In these inter-Commissioner memoranda (called COMSECYs), one Commissioner recommends a particular course of action to the other Commissioners.

The Commission also receives memoranda from the staff, the bulk of which provides information on current topics and does not require any Commission action. Certain staff memorandum, however, may contain recommendations or seek guidance from the Commission views on the topic using the COMSECY system. SECY may also issue vote sheets for staff memoranda and follow the procedures established for SECY papers, set forth below.

SECY PAPERS

Policy, rulemaking and adjudicatory matters as well as general information is provided to the Commission for consideration in a document style and format established specifically for the purpose. Such documents are referred to as SECY papers. A SECY paper gains its numenclature through the designation (e.g. SECY–86–3) assigned to it by the Secretariat. A heading on the first page designates whether the subject matter relates to the formulation of policy (Policy Issue papers), or to the granting, suspending, revoking or amending of licenses (Adjudicatory Issue papers). Subject matter relating to litigation is also presented in Adjudicatory Issue papers. A description of the various types of SECY papers follows:

A "Commission Meeting Paper" indicates a major issue on which collegial deliberation and vote at a Commission meeting, usually in a public session, is anticipated.

A "Notation Vote Paper" indicates that discussion among Commissioners or a formal vote in a meeting is not required, thereby lending itself to a written notation process. These matters usually represent moderate extensions or elaboration of existing policy and generally set no new precedents.

An "Affirmation Paper" indicates Commission business that does not require discussion among the Commissioners in a meeting, but by law must be voted by the Commissioners in the presence of each other. Such papers are required when the action legally binds those that the NRC regulates (such as final rules) or has a significant legal effect on persons outside the Commission. The Affirmation process is administered through a notation voting system and a subsequent formal declaration of votes in a public session dedicated to this purpose. A Commissioner may request that a formal meeting be held to discuss a paper originally circulated for notation or affirmation voting.

A "Negative Consent Paper" indicates a relatively monor action proposed to be taken by the staff in the future. The Commission is authorized a period of time (usually 10 business days) in which to make its contrary views known; otherwise, SECY will advise the staff that the action proposed in the paper may be taken. A Commissioner may request that a Negative Consent paper be converted to Notation Vote status.

An "Information Paper" denotes information about agency activities without specific reference to policy, rulemaking or adjudication. No Commission action is required.

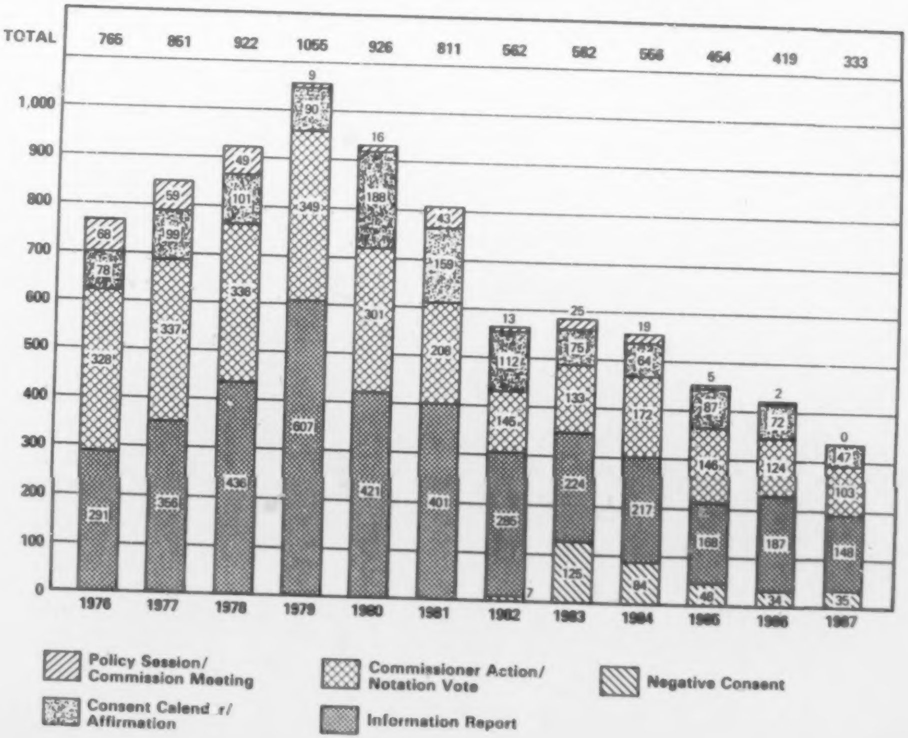
The following chart identifies they type of SECY papers submitted to the Commission during calendar years 1980 through 1987:

SECY PAPERS

	80	81	82	83	84	85	86	87
Action:								
Affirmation	188	159	112	75	64	86	74	47
Notation	301	208	145	133	172	120	104	91
Ex/Import	-	-	-	-		27	25	18
Neg. Consent	0	0	7	125	84	44	27	29
Meeting	16	43	13	25	19	5	2	0
Subtotal	505	410	277	358	339	282	232	185
No action:								
Information	421	401	285	224	217	168	187	148
Total:	926	811	562	582	556	450	419	333

The following graph compares the various types of SECY papers submitted to the Commission in calendar years 1975 through 1985:

OFFICE OF THE SECRETARY - COMMISSION PAPERS



COMSECYS

Inter-Commissioner Action Memoranda (COMSECYS) are written exchanges among Commissioners on issues before the agency or on matters a Commissoner wants to bring to the attention of his fellow Commissioners. The use of this system allows Commissioners to develop preliminary views and direction and to initiate activities prior to staff offices becoming involved. Each memorandum is recorded with the Office of the Secretary and processed with a distinctive control and identification number similar to the SECY paper numbering system. The numbering system consists of a two-letter Commissioner identification, year of issuance, and a consecutive number (e.g., COMJA-86-1, COMTR-86-10). (In the case of Inter-Commissioner Action Memoranda initiated by the Commission's Office of the Secretariat, the designation "COMSECY" is employed.)

The following chart identifies the number of COMSECYS, by originating Commissioner, for calendar years 1980 through 1987:

COMSECYS

	1980	1981	1982	1983	1984	1985	1986	1987
R. Kennedy	6							
J. Hendrie	4	2						
P. Bradford	32	14						
J. Ahearne	37	14	15	4				
V. Gilinsky	12	10	7	11	11			
N. Palladino		9	6	20	54	36	15	
L. Zech					8	13	32	67
T. Roberts		2	2	2	2	10	9	4
J. Asselstine			2	10	11	17	13	3
F. Bernthal				1	2	19	9	8
K. Carr							1	1
COMSECY	6	3	4	5	2	9	7	17
Total	97	54	36	53	90	104	86	100

The action SECY papers and the COMSECYs, taken together, constitute the mechanism by which the Commission conducts a large part of its policy-related business (excluding policy established in response to Congressional correspondence). Thus, for example, by simply adding these two categories of decisions, one can determine that the Commission has rendered decisions or taken action of some sort or another through one of these two mechanisms on 391 matters in 1985 (287 Action SECYs and 104 COMSECYs), 320 matters in 1986 (234 Action SECYs and 86 COMSECYs), and 285 matters in 1987 (189 Action SECYs and 100 COMSECYs).

In an effort to determine the extent to which these decisions are the product of a collegial discussion, with all five Commissioners present to discuss in public the course of action to be taken by the Commission, the Subcommittee has examined these statistics in greater detail, focusing on the number of meetings that were actually held at which the decision was formulated and announced.

According to information provided by the Commission, meetings were held on 22 of the 391 decisions reached in 1985, 9 of the 320 decisions reached in 1986, and 14 of the 285 decisions reached in 1987. The vast majority of the decisions rendered by the Commission are the result of either the COMSECY process or the notation voting process, neither of which generally involve face-to-face deliberation among the Commissioners in a public forum.

FREEDOM OF INFORMATION ACT REQUESTS

The Commission's decision-making documents, including the private interoffice exchanges between a Commissioner and his personal staff, are regularly subject to review for possible release under the Freedom of Information Act (FOIA). Upon receipt of an FOIA request for Commissioner records, individual Comissioner offices are advised and expected to identify and review all records within the scope of the request. Release/withhold decisions are made by the individual offices. If withheld documents are subject to later FOIA appeal, a second review is conducted and final decisions are made by the individual offices with the advice of the General Counsel.

Commissioner offices are consulted prior to the release of the decision-making documents, after review by the General Counsel's Office and SECY. If any of the documents are withheld and are the subject of a later FOIA appeal, Commissioners will be consulted only when the Secretary plans to grant the appeal. If the Secretary, in consultation with the General Counsel, recommends granting an appeal, a draft letter with a cover note explaining why the release is desirable or required will be circulated for the Commission's concurrence.

APPENDIX 9. ROLE OF THE OFFICE OF MANAGEMENT AND BUDGET

In response to the Subcommittee's request for a comprehensive summary of the relationship of the Office of Management and Budget to the Nuclear Regulatory Commission, the Commission has provided the following: [395]

NRC LEGISLATION

The Budget and Accounting Act of 1921, 31 U.S.C. Sec. 1108, requires the NRC to submit its appropriations and supplemental appropriations requests to the President. The procedures for complying with this statutory requirement are set forth in OMB Circular A-11.

Pursuant to that Circular, the NRC submits its annual budget requests, including proposed personnel ceilings, to the Office of Management and Budget for their review and approval. Pursuant to Circulars A-11 and A-19, the Commission is also required to submit for OMB review and approval any legislative proposals needed to implement its budget request (authorization bill) and its congressional testimony supporting its budget request. These are the Agency's only legislative submissions that are reviewed by OMB.

The NRC's proposed appropriations and supplemental appropriations requests are submitted to OMB for their review. Various briefings and discussions are normally held with OMB concerning our request. Subsequently OMB issues its preliminary recommendations. The NRC then has an opportunity to reclama the OMB's preliminary recommendation. As a result of this reclama process, a final OMB decision is issued concerning our requests.

The NRC's proposed authorization bills and supporting budget testimony are drafted by the NRC and submitted to the Office of Legislative Reference, OMB, for their review. OMB then provides written comments on the draft authorization bill to the NRC. In the past OMB's suggested changes have been acceptable to the NRC, and the Agency has incorporated OMB's comments, after making any necessary editorial changes. If OMB's proposed revisions had been unacceptable, further discussions between the two agencies would have ensued. The Commission has also submitted its proposed budget testimony to OMB for their review. OMB has never proposed any revisions to this testimony.

OMB does not review the Commission's non-budgetary testimony, legislative proposals (other than the Commission's authorization bill), responses to Congressional correspondence, views to Congress on specific legislative proposals, or proposed agency regulations. Copies of Congressional testimony are provided to OMB after the hearing for its information. Copies of legislative proposals and comments on specific bills are provided to OMB after they have been submitted to Congress.

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[395] The information set forth in this Appendix was contained in a letter from Lando W. Zech, Jr., Chairman, Nuclear Regulatory Commission, to the Honrable Alan K. Simpson, March 17, 1988.

In formulating Administration positions on issues, OMB frequently solicits the NRC's views. OMB provides the NRC with draft legislative proposals, Executive Orders, OMB Bulletins and Circulars, Executive Branch agency testimony, and proposed Executive Branch agency comments on specified legislative proposals. Our views are also sought on some enrolled bills.

When OMB desires NRC's views on a legislative matter, it submits its request to a designated contact in our Office of the General Counsel. If NRC has substantive comments on the matter, or the matter is of particular importance to the NRC, written views are provided to OMB. If we have no comments, or only have editorial suggestions, we generally provide our views by telephone.

Occasionally, NRC representatives will be asked to attend interagency meetings chaired by OMB to discuss a particular legislative proposal. Representatives of our General Counsel's office and, if appropriate, the NRC staff attend these meetings.

The relationship described above has existed for several years. To a limited extent, this is a change from the NRC-OMB relationship described in a letter to Congressman Eckhardt dated June 12, 1980.[396] There the Commission indicated that it had been its practice to submit certain proposed non budgetary actions to OMB for their review to the extent feasible, with due regard to the independent responsibilities of the Commission. The Commission indicated that proposals for changes in statutory authority and agency structure were generally submitted to OMB for prior comment to avoid unnecessary inconsistencies with Administration policy. At some unspecified date after submitting that letter, the NRC decided that prior OMB review of its proposed actions should only be sought when OMB had the clear legal authority to require the review—on budgetary matters.

PAPERWORK REDUCTION ACT

The Paperwork Reduction Act of 1980 requires the Commission to submit any proposed information collection requirements that the Commission plans to impose through its regulations to OMB for review. Information collection requests that would affect 10 or more members of the public that are not imposed by regulation are also reviewed by OMB. OMB's decisions on whether the information can be collected may be overridden by a majority vote of the Commission.

Proposed information collection requirements are submitted to OMB by the NRC's senior official under the Paperwork Reduction Act with a supporting statement that explains the requirement, the need for the information, and the cost burden of collecting the information. OMB reviews the submittal, asks follow-up questions, and then responds by providing the Commission with a clearance number to affix to the published requirement or their comments about the proposed information collection requirement. These comments have been considered by the Commission in the context of rulemakings and accepted or rejected as the Commission deemed appropriate.

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[396] Letter from John F. Ahearne, Chairman, Nuclear Regulatory Commission, to The Honorable Bob Eckhardt, June 12, 1980.

NRC BUDGET REQUESTS

The NRC requests resources to implement programs which are responsive to a number of different laws, such as: the Atomic Energy Act of 1954, as amended; the Energy Reorganization Act of 1974, as amended; the Nuclear Waste Policy Act of 1982, as amended; the Low level Radioactive Waste Policy Act of 1985, as amended; the West Valley Demonstration Project Act; the Uranium Mill Tailings Radiation Control Act of 1978; and others. The NRC does not subdivide its budget request to align with the various statutes which authorize its programs.

The following table delineates the budget requests by the NRC for the last five fiscal years along with the corresponding amounts approved by OMB.

[In millions of dollars]

	NRC budget request	OMB mark
Fiscal year:		
1985	496,400	468,200
1986	529,800	429,000
1987	478,000	405,000
1988	427,800	427,800
1989	461,165	450,000

The following table delineates the personnel resource requests by the NRC for the last five fiscal years along with the corresponding amounts approved by OMB.

[Staff in FTE]

	NRC rfequest	OMB mark
Fiscal year:		
1985	3,641	3,491
1986	3,731	3.491
1987	3,491	3,369
1988	3,250	3,250
1989	3,180	3,180

As stated above, the NRC requests resources to implement programs which are responsive to a number of different laws, and the agency does not subdivide its budget request to align with the various statutes which authorize its programs.

The requests for personnel ceilings by fiscal year are developed as an integral part of the overall NRC budget formulation process.

This process includes an evaluation of the various functions which have to be performed and a determination of which functions are properly performed with agency staff versus those activities which can be performed under contract or interagency agreement. Resources are then requested accordingly. The current personnel ceiling has not caused the agency to award contracts beyond its normal plans. Outside consultants are obtained when necessary to provide expertise which is not available on the NRC staff.

Executive Orders and Budget Circulars

The NRC determined whether to comply with an Executive Order or OMB Circular after a review that is focused on whether there is a constitutional or statutory basis for applying the requirement to an independent regulatory agency. With respect to the Executive Orders and OMB Circulars that the NRC does not comply with, its compliance either is not required by statute or the terms of the Order or Circular, or compliance would be inconsistent with the Commission's status as an independent regulatory agency.

The following are examples of Executive Orders and Budget Circulars that the Commission complies with:

EXECUTIVE ORDERS

Contracts

(1) E.O. 10582.

Title: "Buy American Act Procedures".

Description: Requires agencies to add a price differential to bids/offers proposing foreign products and comparing those to domestic bids/offers for the purpose of determining the award.

(2) E.O. 10789.

Title: "Authorizing Agencies of the Government to Exercise Certain contracting Authority in Connection with National-Defense Functions and Prescribing Regulations Governing the Exercise of Such Authority."

Description: Allows agencies to provide exraordinary contractual relief for contract claims.

(3) E.O. 11141.

Title: "Declaring A Public Policy Against Discrimination On The Basis of Age."

Description: Government Contractors may not discriminate against persons on the basis of their age in employment practices.

(4) E.O. 11222.

Title: "Prescribing Standards of Ethical Conduct for Government Officers and Employees."

Description: Prescribes Standards of Conduct for Government Employees.

(5) E.O. 11246.

Title: "Equal Employment Opportunity."

Description: To ensure equal opportunity for employment with government contractors, all contracts and grants must contain a clause setting forth a policy against employment discrimination.

(6) E.O. 11625.

Title: "National Program for Minority Business Enterprise."

Description: Encourages contracting with minority business enterprises.

(7) E.O. 11701.

Title: "Employment of Veterans by Federal Agencies and Government Contractors and Subcontractors."

Description: Government contractors are required to list employment openings with the employment service systems to aid veterans in returning to work.

(8) E.O. 11738.

Title: "Environmental Protection Policy."

Description: Provides for administration of the Clean Air Act and the Federal Water Pollution Control Act with respect to Federal contracts and grants.

(9) E.O. 11755.

Title: "Relating to Prison Labor."

Description: Government contractors must agree not to employ convicts sentenced to hard labor.

(10) E.O. 11758.

Title: "Authority Under Rehabilitation Act of 1973."

Description: Every contract and grant is subject to the Rehabilitation Act. Government contractors may not discriminate against employees or applicants because of physical or mental handicap.

(11) E.O. 12073.

Title: "Federal Procurement in Labor Surplus Areas"

Description: Authorizes agencies to make procurement set-asides in labor surplus areas to strengthen the economy.

(12) E.O. 12138.

Title: "Creating a National Women's Business Enterprise Policy And Prescribing Arrangements for Developing, Coordinating and Implementing A National Program For Women's Business Enterprise"

Description: Establishes policy for affirmative action in support of women-owned small businesses, including the area of procurement. Federal contractors must agree to use best efforts to give subcontracting opportunities to women-oriented small businesses.

(13) E.O. 12352.

Title: "Federal Procurement Reform"

Description: Requires agencies to improve effectiveness of procurement systems, enhance competition and limit noncompetitive actions, simplify small purchases, ensure timely payment to contractors, establish clear lines of contracting authority and accountability, and establish career management programs for procurement work force.

(14) E.O. 12430.

Title: "Report of Identical Bids"

Description: Revokes requirement for all agencies to report identical bids to the Attorney General.

(15) E.O. 12549.

Title: "Debarment and Suspension of Participants in Federal Programs."

Description: Establishes a Government-wide system for collecting information on organizations who are debarred or declared ineligible to receive contracts by reason of noncompliance with other laws or executive orders.

Facilities

(1) E.O. 12072.

Title: "Space Acquisition."

Description: This order established standards and procedures regarding the acquisition of Federal space for Government agencies.

(2) E.O. 12196.

Title: "Occupational Safety and Health Program for Federal Employees."

Description: E.O. 12196 revoked E.O. 11807 of September, 1974. It requires the head of each agency to furnish space which is safe and free of recognized hazards, and established health and safety guidelines regarding the inspection of Government facilities.

(3) E.O. 12411.

Title: "Government Work Space Management Reform."

Description: The intent of this order was to improve the management and performance of Federal work space. It established a goal of optimal efficient utilization of Federal work space.

(4) E.O. 12512.

Title: "Federal Real Property Management."

Description: The order established that real property is to be managed as an asset. Responsibility for this management lies with each particular agency, and each is required to devise an annual property management improvement plan with specific goals for the administration of its property and space.

Transportation

(1) E.O. 11912.

Title: "Delegation of Authorities Relating to Energy Policy and Conservation.

Description: The Administrator of General Services shall exercise the authority to ensure that passenger automobiles acquired by all Executive agencies in each fiscal year achieve a fleet average fuel economy standard that is not less than the average fuel economy standard for automobiles manufactured for the model year which includes January 1, of each fiscal year.

(2) E.O. 12191.

Title: "Federal Facility Ridesharing Program."

Description: Executive agencies shall promote the use of ridesharing by personnel working at Federal facilities.

(3) E.O. 12261.

Title: "Gasohol in Federal Motor Vehicles."

Description: Gasohol shall be the preferred fuel for Federal vehicles whenever or wherever feasible.

Security

(1) E.O. 12356.

Title: "National Security Information."

Description: NRC originates/handles National Security Information and assures compliance with this order.

(2) E.O. 10450.

Title: "Security Requirements for Government Employment"

Description: NRC meets the security suitability/clearance requirements established for federal employees.

(3) E.O. 10865.

Title: "Safeguard Classified Information Within Industry."

Description: NRC assures compliance for the protection of classified information provided to our contractors and licensees.

(4) E.O. 12333.

Title: "United States Intelligence Activities."

Description: As the recipient of intelligence information, NRC complies with the protective measures for such information.

OMB CIRCULARS

Number and Title

A-1—OMB's System of Circulars and Bulletins to Executive Departments and Establishments.

A-3—Government Publications.

A-10—Responsibilities for Disclosure with Respect to the Budget Transmittal Memorandum No. 1.

A-11—Preparation and Submission of Budget Estimates Transmittal Memorandum No. 58.

A-12—Object Classification; Transmittal Memorandum No. 1; Transmittal Memorandum No. 2; and Transmittal Memorandum No. 3.

A-19—Legislative Coordination and Clearance; Transmittal Memorandum No. 1 (Budgetary Legislation Only).

A-21—Cost principles for Educational Institutions; Transmittal Memorandum No. 1.

A-25—User Charges; Transmittal Memorandum No. 1; and Transmittal Memorandum No. 2.

A-34—Instructions on Budget Execution; Transmittal Memorandum No. 11.

A-50—Audit Follow Up.

A-73—Audit of Federal Operations and Programs.

A-76—Performance of Commercial Activities; Transmittal Memorandum No. 1; Transmittal Memorandum No. 2; Transmittal Memorandum No. 3; and Transmittal Memorandum No. 5.

A-87—Cost principles for State and Local Governments.

A-89—Federal Domestic Assistance Program Information.

A-104—Evaluating Leases of Capital Assets.

A-105—Standard Federal Regions.

A-108—Responsibilities for the Maintenance of Records about Individuals by Federal Agencies.

A-110—Uniform Administrative Requirements for Grants and Other Agreements with Institutions of Higher Education, Hospitals, and Other Nonprofit Organizations.

A-114—Management of Federal Audiovisual Activities.

A-119—Federal participation in the Development and Use of Voluntary Standards.

A-120—Guidelines for the Use of Advisory and Assistance Services.

A-123—Internal Control Systems.

A-125—Prompt Payment.

A-127—Financial Management Systems.

A-130—Management of Federal Information Resources.

The following are examples of Executive Orders and OMB Circulars that the NRC does not comply with:

EXECUTIVE ORDERS

(1) E.O. 12291.

Title: "Federal Regulation."

Description: Requires preparation of regulatory impact analysis for major rules that would be reviewed by OMB prior to publication.

(2) E.O. 12498.

Title: "The Regulatory Planning Process."

Description: Requires submission of a draft regulatory program to OMB each year for its review. The program is to set forth regulatory policies, goals, and objectives for the coming year.

(3) E.O. 12612.

Title: "Federalism."

Description: Requires preparation of Federalism Assessments to accompany submissions sent to OMB for review pursuant to Executive Order 12991 or OMB Circular A-19.

OMB CIRCULARS

Number and Title

A-19—Legislative Coordination and Clearance (to the extent that it requires submission of non-budgetary legislative proposals to OMB for review).

A-88—Indirect Cost Rates, Audit and Audit Follow-Up at Educational Institutions.

APPENDIX 10. ABNORMAL OCCURRENCES

CRITERIA FOR DECLARING ABNORMAL OCCURRENCES AT NUCLEAR POWER PLANTS

Pursuant to criteria established by the Nuclear Regulatory Commission, an event will be considered an abnormal occurrence if it involves a major reduction in the degree of protection of the public health or safety. Such an event would involve a moderate or more severe impact on the public health or safety and could include but need not be limited to—

(1) moderate exposoure to, or release of, radioactive material licensed by or otherwise regulated by the Commission;

(2) major degradation of essential safety-related equipment; or

(3) major deficiencies in design, construction, use of, or management controls for licensed facilities or material.

Examples of the type of events that are evaluated by the NRC in detail using these criteria, with specific examples of abnormal occurrences that have been declared by the Commission under each of these criteria, are set forth below:

For All Licensees

(1) Exposure of the whole body of any individual to 25 rems or more of radiation; exposure of the skin of the whole body of any individual to 150 rems or more of radiation; or exposure of the feet, ankles, hands or forearms of any individual to 375 rems or more of radiation (10 CFR Sec. 20.403(a)(1)), or equivalent exposures from internal sources.

Example: *Occupational Overexposures to Skin and Extremities* (Abnormal Occurrence 80-1)

On August 29, 1979, the Metropolitan Edison Company reported to the NRC the overexposures to six workers on August 29, 1979, at the Unit 2 Three Mile Island Nuclear Station located near Middletown, Pennsylvania. The workers' skin was exposed to 166 rems.

On August 28, 1979, six individuals, one a contractor Health Physics foreman, entered the north makeup valve room in the TMI Unit 2 Fuel Handling Building to inspect and tighten leaking valves in preparation for room decontamination. Reactor coolant system water leaking from these valves was highly contaminated as a result of the March 28, 1979 accident.

Occupancy for each individual during the work was limited to a four-minute stay time and to areas not exceeding 15 rem per hour of gamma radiation. However, the survey instrument used is not designed to measure beta radiation dose rates on range selections in excess of 2 rem per hour.

These overexposures resulted from inadequate review and planning in preparation for the work and an inadequate radiation survey. The radiation survey instrument was not capable of measuring the actual radiation dose rate. The Health Physics representative was not adequately trained, or alerted, to survey for beta radiation in this work; and the radiation work permit thus did not require protective clothing adequate to prevent these overexposures.

(2) An exposure to an individual in an unrestricted area such that the whole-body dose received exceeds 0.5 rem in one calendar year (10 CFR Sec. 20.104(a)).

Example: No abnormal occurrences have been declared at nuclear power plants under this criterion.

(3) The release of radioactive material to an unrestricted area in concentrations which, if averaged over a period of 24 hours, exceed 500 times the regulatory limit of Appendix B, Table II, 10 CFR Part 20 (10 CFR Sec. 20.403(b)(2)).

Example: No abnormal occurrences have been declared at nuclear power plants under this criterion.

(4) Radiation or contamination levels in excess of design values on packages, or loss of confinement of radioactive material such as (a) radiation dose rate of 1,000 mrem per hour three feet from the surface of a package containing the radioactive material, or (b) release of radioactive material from a package in amounts greater than the regulatory limit.

Example: No abnormal occurrences have been declared at nuclear power plants under this criterion.

(5) Any loss of licensed material in such quantities and under such circumstances that substantial hazard may result to persons in unrestricted areas.

Example: No abnormal occurrences have been declared at nuclear power plants under this criterion.

(6) A substantiated case of actual or attempted theft or diversion of licensed material or sabotage of a facility.

Example: *Damage to New Fuel Assemblies* (Abnormal Occurrence 79-6).

On May 7, 1979, the NRC Resident Inspector at the Surry Power Station was notified by the licensee (Virginia Electric and Power Company) that while conducting inspections on new fuel for Unit 2 it was found that 62 of 64 fuel assemblies were coated with a white crystalline substance. An analysis of the substance determined it to be sodium hydroxide. The licensee determined that there were no indications of damage to the spent fuel, nor was there evidence of unauthorized individuals gaining access to the vital area.

The cause was an alleged criminal act. On May 7, the licensee notified the FBI of the damage to the new fuel. The FBI conducted an investigation which culminated in two plant workers surrendering to Surry County authorities on June 19, 1979. The two workers, under advice from their attorney, have refused to describe the details of the safety issues which reportably motivated them to commit the acts.

(7) Any substantiated loss of special nuclear material or any substantiated inventory discrepancy which is judged to be significant relative to normally expected performance and which is judged to be caused by theft or diversion or by substantial breakdown of the accountability system.

Example: No abnormal occurrences have been declared at nuclear power plants under this criterion.

(8) Any substantial breakdown of physical security or material control (i.e., access control, containment, or accountability systems) that significantly weakened the protection against theft, diversion, or sabotage.

Example: *Significant Safeguards Deficiencies at Wolf Creek and Fort St. Vrain* (Abnormal Occurrence 86–17)

On July 7, 1986, NRC Region IV issued enforcement letters containing Severity Level II violations to the licensees of two nuclear power plant stations for serious deficiencies in plant physical barriers. The licensees are: (1) Kansas Gas and Electric Company, operator of the Wolf Creek Generating Station; and (2) Public Service Company of Colorado, operator of Fort St. Vrain.

The July 7, 1986 letters identified serious failures of the licensees to comply with NRC regulatory requirements pertaining to physical barriers. In the most serious example, it was determined at the Wolf Creek Generating Station that multiple uncontrolled access paths existed from the Owner Controlled Area into the Protected Area and in two instances into Vital Areas.

In these examples, conditions existed whereby an intruder could have obtained unauthorized and undetected access into protected and/or vital areas from the OCA. It appeared from the inspections and review of licensee records that the conditions had existed at both plants for a minimum of six to seven months.

The cause of these occurrences was a failure in management control, including design oversight during the system planning stages, construction deficiencies, and the failure of the startup testing/surveillance program to identify these deficiencies.

(9) An accidental criticality (10 CFR Sec. 70.52(a)).

Example: *Premature Criticality During Startup* (Abnormal Occurrrence 85–1).

On February 28, 1985, during a plant startup at about 1:30 p.m., the Virgil C. Summer Nuclear Station Unit 1 experienced an unanticipated transient which resulted in a high flux positive rate trip (automatic shutdown).

During a nuclear power plant startup, control rods are withdrawn in a predetermined sequence to achieve criticality. In order to avoid rapid increases in power, three barriers of defense are used to automatically trip the reactor. For the February 28, 1985, event, personnel performance, and procedural control failed. Consequently, attaining criticality was not recognized and rod withdrawal was continued until the startup rate approached, by later estimates, 16 to 17 decades per minute.

The cause was primarily due to the failure of the shift supervisor to be fully aware of plant status, to closely monitor instrumentation and to anticipate criticality whenever rods were being withdrawn as required by station procedures.

The actual safety consequences of the event were minimal. However, the event is significant because it represented an unnecessary challenge to the reactor protection system, and because the reactor was not being properly controlled during plant startup.

(10) A major deficiency in design, construction, or operation having safety implication requiring immediate remedial action.

Example: *Main Feedwater Line Brake Due To Water Hammer* (Abnormal Occurrence 83-1).

On January 25, 1983, the Maine Yankee Nuclear Power Plant experienced a reactor trip followed by loss of main feedwater and automatic initiation of the auxiliary feedwater system. The auxiliary feedwater initiation resulted in a water hammer transient in the feedwater lines for two of the three steam generators with a resultant feedwater pipe rupture.

The cause of the event is attributed to incomplete consideration, in ongoing design and operational plant upgrading, of previous generic safety concerns related to steam generator water hammer and feedline thermal stress cracking.

(11) Serious deficiency in management or procedural controls in major areas.

Example: *Deficiencies in Management and Procedural Controls* (Abnormal Occurrence 83-3).

On February 18, 1983, the NRC issued a notice of violations and proposed imposition of civil penalties to Carolina Power and Light Company, licensee for Brunswick Units 1 and 2. The action was based on violations involving technical specification surveillance requirements. Inspection findings indicated that the Brunswick facility has been operated without certain surveillance procedures and verification by surveillance testing of a number of safety systems and components.

The deficiencies were of serious safety concern because the facility had been operated for an extended period of time without the necessary assurance that the equipment would function properly if called upon and the violations suggested a programmatic failure that unless corrected could lead to more serious events.

The cause of the violations was attributed to a breakdown in corporate and facility management controls in the areas of corporate oversight, facility management and operations, and problem identification and correction. The violations raised serious concerns about the adequacy of the safety of operation of the facility in regard to properly protecting the health and safety of the public.

(12) Series of events (where individual events are not of major importance), recurring incidents, and incidents with implication for similar facilities (generic incidents), which create major safety concern.

Example: *Transient Initiated by Partial Loss of Power* (Abnormal Occurrence 80-2).

On February 26, 1980, the Crystal River Unit 3 nuclear generating plant (CR-3) located in Citrus County, Florida, experienced an incident involving an electrical malfunction in an instrumentation and control system.

This resulted in a reactor and turbine trip; the opening of the pressurizer power operated relief valve (PORV), the pressurizer spray valve, and a code safety valve; decreased feedwater flow to the steam generators; actuation of the engineered safety features (ESF) systems; and discharge of approximately 43,000 gallons of primary coolant into the containment building.

A portion of the non-nuclear instrumentation (NNI) +24 volt power supply was lost due to a short to ground. The failure caused false control signals to be sent to the Integrated Control System, the reactor coolant system, and the steam generator.

The immediate cause of the Crystal River Unit 3 event has been identified as a +24 volt power short to ground between knife edge connectors of a Bailey Control Company voltage buffer card. This short circuit cleared itself during subsequent re-energizing of the power supply by burning through the foil on a printed circuit card.

For Commercial Nuclear Power Plants

(1) Exceeding a safety limit of license technical specification. (10 CFR Sec. 50.36(c)).

Example: *Indication of Low Water Level in a Boiling Water Reactor* (Abnormal Occurrence 79-5)

On May 2, 1979, the NRC was notified by the licensee (Jersey Central Power and Light Company) of an event at their Oyster Creek facility. A loss of feedwater transient at the Oyster Creek facility resulted in a significant reduction in water inventory above the reactor core area as measured by onset of water level instruments.

The water level measured within the core shroud area fell below the triple-low water level setpoint, a safety limit, of 5-feet 6-inches above the top of the fuel. Subsequent analyses by the licensee have conservatively determined that the minimum water level over the top of the fuel was 1 to 1-½ feet. Coolant sample analyses and offgas release rates support the conclusion that no fuel damage occurred.

(2) Major degradation of fuel integrity, primary coolant pressure boundary, or primary containment boundary.

Example: *Steam Generator Tube Rupture at R.E. Ginna Nuclear Power Plant* (Abnormal Occurrence 82-4)

At 9:28 a.m. on January 25, 1982, the R.E. Ginna Nuclear Power Plant experienced a reactor trip as a result of a steam generator tube reputure. The R.E. Ginna operating and support staff mitigated the consequences of the January 25 event such that the radiological consequences were insignificant in terms of risk from any resultant on-site or off-site exposures.

Steam generator tubes in a pressurized water reactor are an integral part of the reactor coolant pressure boundary. The loss of integrity of steam generator tubes results in a breach of the primary-to-secondary system boundary. Periodic inspections are required to assure that defective steam generator tubes are detected and removed from service. In spite of these design and administrative controls, the rupture of a steam generator tube can happen and did occur at Ginna, and previously at Point Beach Unit 1, Surry Unit 2 and Prairie Island Unit 1. This is one of the design basis accidents considered in the NRC safety review of nuclear power plants.

(3) Loss of plant capability to perform essential safety functions such that a potential release of radioactivity in excess of 10 CFR Part 100 guidelines could result from a postulated transient of accident (e.g., loss of emergency core cooling system, loss of control rod system).

Example: *Inoperable Containment Spray System* (Abnormal Occurrence 82-7).

On October 28, 1982, Alabama Power Company notified the NRC that the manual isolation valves for both train A and train B of the containment spray system were found locked in the closed position at their Farley Nuclear Plant Unit 2. These valves supply separate, redundant, containment spray rings.

The safety function of the containment spray is to limit the maximum pressure in the containment and to remove radioactive iodine which would limit iodine doses should a LOCA occur.

The event was caused by the valves not being in conformance with design drawings. A unique condition developed in these valves when Westinghouse made a design change that lengthened the valve stem. Therefore, operators, who were instructed and trained to observe valve stem positions in order to verify the valve positions, erroneously interpreted these valves are being open when they were, in fact, closed.

The importance of the event is emphasized since the subject valves at Farley are located inside containment and are manually operated. In the event of a LOCA or a MSLB accident, the valves would not be accessible to be opened by plant personnel.

(4) Discovery of a major condition not specifically considered in the safety analysis report (SAR) or technical specification that requires immediate remedial action.

Example: *Abnormal Cooldown and Depressurization Transient at Catawba Unit 2* (Abnormal Occurrence 86-16).

On June 27, 1986, while Duke Power Company was conducting a startup test at Catawba Unit 2 from remotely located control panels, the reactor experienced an unexpected depressurization and cooldown. During the morning of June 27, the licensee planned to perform a Loss of Control Room Functional Test to fulfill one of the commitments for startup testing delineated in its Final Safety Analysis Report.

At 9:41 a.m., the test was initiated with the reactor at 24% power. The crew of five left the control room, tripped the reactor from the trip breaker panel, and proceeded to the two remotely-located ASPs and the auxiliary feedwater pump turbine control panel. By design, the transfer blocked automatic initiation of safety injection. By error, the transfer of control of steam generator power operated relief valves to the auxiliary feedwater pump turbine control panel also commanded all four PORVs to open to seventy-five percent of full stroke.

Reactor pressure and pressurizer level, which had been decreasing slowly as a result of the cooldown after the trip, fell rapidly. The transfer which automatically initiated a SI, occurred at a pressure of 702 psig. The cooldown and depressurization transient did not result in any adverse thermohydraulic or nuclear effects on the plant; there were no actual consequences to public health or safety. However, if the decay heat load of the reactor core had been greater and if the use of the shutdown panels had been actually required during a plant emergency, a more severe transient could have occurred.

The underlying cause of this event was the failure to specify in the Design Control documents that the mode of control of the S/G PORV controllers had been changed. As a consequence, the staff assigned to perform the test did not understand the function and interaction of controls on the shutdown panels.

(5) Personnel error or procedural deficiencies which result in loss of plant capability to perform essential safety functions such that a potential release of radioactivity in excess of 10 CFR Part 100 guidelines could result from a postulated transient or accident (e.g., loss of emergency core cooling system, loss of control rod system).

Example: *Significant Degradation of Plant Safety at Oyster Creek* (Abnormal Occurrence 87-14)

On April 24, 1987, while the Oyster Creek reactor was being shut down, personnel errors resulted in a condition which could have resulted in containment failure had a loss of coolant accident occurred. The plant was being shut down for maintenance with the mode switch in the RUN position; reactor power was approximately 23% at the time of the event.

The licensee planned to enter the drywell to repair an acoustic monitor. In order to enter the drywell safely, the containment atmosphere must first be purged to displace the nitrogen atmosphere to ensure proper oxygen levels are present to aid personnel entry. The group shift supervisor believed the deinerting was not progressing as rapidly as it had in the past and elected to initiate a mechanical temporary variation.

The cause of the April 24 event has been determined to be personnel error, due to deficiencies in management and procedural controls. The operations shift supervisor and the shift technical advisor who reviewed the temporary variation should have been cognizant of the technical specification requirement specifying that the torus to drywell vacuum breaker valves must be operable when primary containment is required. A written safety evaluation was not performed.

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